SUPREME COURT OF THE UNITED STATES.

No. 187.

HIRAM CLEARWATER, PLAINTIFF IN ERROR,

vs.

SOLOMON MEREDITH, PLEASANT JOHNSON, CALEB B. SMITH, AND THOMAS TYNER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

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1 Pleas of the circuit court of the United States for the seventh judicial circuit and district of Indiana, begun, continued, and holden at Indianapolis, in said district, on the thirteenth day of December, in the year of our Lord one thousand eight hundred and sixty-one, before the honorable Samuel H. Treat, district judge of the United States.

HIRAM CLEARWATER
vs.
SOLOMON MERRIDETH, PLEASENT JOHNSON, CALEB B. SMITH, THOMAS TYNER. } Assumpsit.

Be it remembered that heretofore, to wit, on the twenty-first day of December, in the year of our Lord one thousand eight hundred and fifty-nine. comes the plaintiff, by his attorneys, Messrs. McDonald and Walker, and files in the clerk's office of said court his certain declaration, in the words and figures following, to wit:

THE UNITED STATES OF AMERICA,
District of Indiana, to wit:

In the circuit court of the seventh circuit and district aforesaid, as of the May term, in the year of our Lord one thousand eight hundred and sixty, Pleasent Johnson, Solomon Merrideth, Thomas Tyner, and Caleb B. Smith, defendants, who are all citizens of the State
2 of Indiana, were summoned to answer unto Hiram Clearwater, plaintiff, who is a citizen of the State of Ohio, of a plea of trespass on the case upon promises. And hereupon the said Hiram, by his attorneys, complains for that whereas heretofore, on the twelfth day of July, in the year eighteen hundred and fifty, thereat, the district of Indiana aforesaid, the defendants made and delivered to the plaintiff their certain agreement with him, in writing, of that date, whereby it was recited that the plaintiff, on the sixth day of May, in the year eighteen hundred and fifty-three, had contracted with the Cincinnati, Cambridge, and Chicago Short Line Railway Company for the sale of a tract of land situate in Wayne county, Indiana, lying on the national road, about four miles east of Cambridge City, and adjoining the lands of John Jacobs and others, containing three hundred and twenty acres, for the consideration of ten thousand dollars, to be paid in the capital stock of the said company at par; and in such contract of sale it was agreed that the said company should furnish to the plaintiff a guaranty that the capital stock of the said railway company should be at par within one year from the completion of the entire line of the said roads; and whereby, also, in consideration that the plaintiff had, with the consent of the said company, and at the request of the defendants, executed a deed of conveyance for the said land to Solomon Merrideth, (to whom it had been sold by the said company,) the defendants guarantied
3 the plaintiff that the stock of the said company, which had

been issued to him in pursuance of the said contract, should be worth par in the city of Cincinnati within one year from the time the said railroad should be completed from Cincinnati to New Castle, Indiana, and that the said road should be completed within two years from the first day of October, in the year eighteen hundred and fifty-three. And the plaintiff says that the stock of the said Cincinnati, Cambridge, and Chicago Short Line Railway Company, issued to him in pursuance of the contract recited in the said agreement, consisted of two hundred shares, of the nominal value of fifty dollars each, of which said shares at the time of the making and delivery of the said agreement by the defendants, and thence continually untill the commencement of this suit, he was, and still is, the owner, to wit, at the district aforesaid. And the plaintiff avers that the said road was not completed from Cincinnati to New Castle, Indiana, within two years from the first day of October, in the year eighteen hundred and fifty-three, and that the stock issued to him, in pursuance of the contract mentioned in the said agreement, was not worth par in the city of Cincinnati within one year from the first day of October, in the year eighteen hundred and fifty-five, nor at any time thence continually until the commencement of this action; but, on the contrary,
4 during all the time aforesaid the said stock was of no value in the city of Cincinnati, of all which premises the defendants had notice, to wit, at the district aforesaid; by reason whereof, and according to the form and effect of their said agreement, so made and delivered to the plaintiff as aforesaid, the defendants, on the first day of October, in the year eighteen hundred and fifty-six, became liable to pay to the plaintiff the par value of the said stock so as aforesaid issued to him, namely, ten thousand dollars; that is to say, fifty dollars for each and every of the two hundred shares, to wit, at the district aforesaid; and, being so liable in consideration thereof, then and there undertook and faithfully promised the plaintiff to pay him the said sum of ten thousand dollars when thereunto afterwards requested. Yet the defendants, although often thereunto since requested, have not, nor has either of them, paid the said sum of ten thousand dollars, or any part thereof; but to pay the same, or any part thereof, have hitherto wholly refused, and do still refuse, to wit, at the district aforesaid. And, also, for that whereas heretofore, to wit, on the sixth day of May, in the year eighteen hundred and fifty-three, at the district of Indiana aforesaid, the plaintiff agreed to sell to the Cincinnati, Cambridge, and Chicago Short Line Railway Company a certain other tract of land, situate in Wayne co., Indiana, lying on the national road, about four miles east of Cambridge City, and
5 adjoining the lands of John Jacobs and others, containing three hundred and twenty acres, for the sum of ten thousand dollars in the capital stock of the said company, upon condition that the said Co. would furnish him, the said plaintiff, a guaranty that its capital stock should be at par within one year from the completion of the entire line of the road to be constructed by the said company, which agreement remained incomplete, and the title of the said last-mentioned tract of land still vested in the plaintiff, because of the failure

of the said company to furnish him such guaranty as aforesaid from the said sixth day of May untill the twelfth day of July, in the same year, to wit, at the district aforesaid. And thereupon, to wit, on the said twelfth day of July, in the year aforesaid, at the district aforesaid, in consideration that the plaintiff, with the consent of the said company, and at the request of the defendants, would execute a deed of conveyance for the said last-mentioned tract of land to Solomon Merrideth, (to whom the same had been sold by the said company,) the defendants then and there guarantied and promised the plaintiff that the stock of the said company issued to him, in pursuance of the agreement hereinbefore mentioned, should be worth par in the city of Cincinnati within one year from the time the said railroad should be completed from Cincinnati to New Castle, Indiana, and that the said road should be completed within two years from the first day of October, in the year eighteen hundred and fifty-three. And the plaintiff says that, confiding in the said
6 guaranty and promise of the defendants, he did then and there convey the said last-mentioned tract of land to the said Solomon Merrideth, and accept two hundred shares (of the nominal value of fifty dollars for each share) in the capital stock of the said company, which said shares of stock he, the said plaintiff, has ever since owned, and does still own, to wit, at the district aforesaid. And the plaintiff avers that the said railroad was not completed from Cincinnati to New Castle, Indiana, within two years from the first day of October, in the year eighteen hundred and fifty-three, and that the stock so as aforesaid issued to him, and by him accepted, was not worth par in the city of Cincinnati within one year from the first day of October, in the year eighteen hundred and fifty-five, nor at any time thence continually untill the commencement of this action; but, on the contrary, during all the time aforesaid the said stock was of no value in the city of Cincinnati; of all which premises the defendant had notice, to wit, at the district aforesaid; by reason whereof the defendants, on the first day of October, in the year eighteen hundred and fifty-six, became liable to pay to the plaintiff the par value of the said stock, so as aforesaid issued to him and accepted by him, namely, ten thousand dollars; that is to say, fifty dollars for each and every of the two hundred shares, to wit, at the district aforesaid; and, being so liable, in consideration thereof then and there undertook and faithfully promised the plaintiff to pay him the said sum of ten thousand dollars when thereunto
7 afterwards requested. Yet the defendants, although often thereunto since requested, have not, nor has either of them, paid the said sum of ten thousand dollars, or any part thereof, but to pay the same, or any part thereof, have hitherto wholly refused, and do still refuse, to wit, at the district aforesaid.

Wherefore the plaintiff says that he is injured, and hath sustained damages of twenty thousand dollars, and thereupon he brings suit.

McDONALD & WALKER,
Pl'ff Att'y.

been issued to him in pursuance of the said contract, should be worth par in the city of Cincinnati within one year from the time the said railroad should be completed from Cincinnati to New Castle, Indiana, and that the said road should be completed within two years from the first day of October, in the year eighteen hundred and fifty-three. And the plaintiff says that the stock of the said Cincinnati, Cambridge, and Chicago Short Line Railway Company, issued to him in pursuance of the contract recited in the said agreement, consisted of two hundred shares, of the nominal value of fifty dollars each, of which said shares at the time of the making and delivery of the said agreement by the defendants, and thence continually untill the commencement of this suit, he was, and still is, the owner, to wit, at the district aforesaid. And the plaintiff avers that the said road was not completed from Cincinnati to New Castle, Indiana, within two years from the first day of October, in the year eighteen hundred and fifty-three, and that the stock issued to him, in pursuance of the contract mentioned in the said agreement, was not worth par in the city of Cincinnati within one year from the first day of October, in the year eighteen hundred and fifty-five, nor at any time thence continually until the commencement of this action; but, on the contrary,
4 during all the time aforesaid the said stock was of no value in the city of Cincinnati, of all which premises the defendants had notice, to wit, at the district aforesaid; by reason whereof, and according to the form and effect of their said agreement, so made and delivered to the plaintiff as aforesaid, the defendants, on the first day of October, in the year eighteen hundred and fifty-six, became liable to pay to the plaintiff the par value of the said stock so as aforesaid issued to him, namely, ten thousand dollars; that is to say, fifty dollars for each and every of the two hundred shares, to wit, at the district aforesaid; and, being so liable in consideration thereof, then and there undertook and faithfully promised the plaintiff to pay him the said sum of ten thousand dollars when thereunto afterwards requested. Yet the defendants, although often thereunto since requested, have not, nor has either of them, paid the said sum of ten thousand dollars, or any part thereof; but to pay the same, or any part thereof, have hitherto wholly refused, and do still refuse, to wit, at the district aforesaid. And, also, for that whereas heretofore, to wit, on the sixth day of May, in the year eighteen hundred and fifty-three, at the district of Indiana aforesaid, the plaintiff agreed to sell to the Cincinnati, Cambridge, and Chicago Short Line Railway Company a certain other tract of land, situate in Wayne co., Indiana, lying on the national road, about four miles east of Cambridge City, and
5 adjoining the lands of John Jacobs and others, containing three hundred and twenty acres, for the sum of ten thousand dollars in the capital stock of the said company, upon condition that the said Co. would furnish him, the said plaintiff, a guaranty that its capital stock should be at par within one year from the completion of the entire line of the road to be constructed by the said company, which agreement remained incomplete, and the title of the said last-mentioned tract of land still vested in the plaintiff, because of the failure

of the said company to furnish him such guaranty as aforesaid from the said sixth day of May untill the twelfth day of July, in the same year, to wit, at the district aforesaid. And thereupon, to wit, on the said twelfth day of July, in the year aforesaid, at the district aforesaid, in consideration that the plaintiff, with the consent of the said company, and at the request of the defendants, would execute a deed of conveyance for the said last-mentioned tract of land to Solomon Merrideth, (to whom the same had been sold by the said company,) the defendants then and there guarantied and promised the plaintiff that the stock of the said company issued to him, in pursuance of the agreement hereinbefore mentioned, should be worth par in the city of Cincinnati within one year from the time the said railroad should be completed from Cincinnati to New Castle, Indiana, and that the said road should be completed within two years from the first day of October, in the year eighteen hundred and fifty-three. And the plaintiff says that, confiding in the said
6 guaranty and promise of the defendants, he did then and there convey the said last-mentioned tract of land to the said Solomon Merrideth, and accept two hundred shares (of the nominal value of fifty dollars for each share) in the capital stock of the said company, which said shares of stock he, the said plaintiff, has ever since owned, and does still own, to wit, at the district aforesaid. And the plaintiff avers that the said railroad was not completed from Cincinnati to New Castle, Indiana, within two years from the first day of October, in the year eighteen hundred and fifty-three, and that the stock so as aforesaid issued to him, and by him accepted, was not worth par in the city of Cincinnati within one year from the first day of October, in the year eighteen hundred and fifty-five, nor at any time thence continually untill the commencement of this action; but, on the contrary, during all the time aforesaid the said stock was of no value in the city of Cincinnati; of all which premises the defendant had notice, to wit, at the district aforesaid; by reason whereof the defendants, on the first day of October, in the year eighteen hundred and fifty-six, became liable to pay to the plaintiff the par value of the said stock, so as aforesaid issued to him and accepted by him, namely, ten thousand dollars; that is to say, fifty dollars for each and every of the two hundred shares, to wit, at the district aforesaid; and, being so liable, in consideration thereof then and there undertook and faithfully promised the plaintiff to pay him the said sum of ten thousand dollars when thereunto
7 afterwards requested. Yet the defendants, although often thereunto since requested, have not, nor has either of them, paid the said sum of ten thousand dollars, or any part thereof, but to pay the same, or any part thereof, have hitherto wholly refused, and do still refuse, to wit, at the district aforesaid.

Wherefore the plaintiff says that he is injured, and hath sustained damages of twenty thousand dollars, and thereupon he brings suit.

McDONALD & WALKER,
Pl'ff Att'y.

HIRAM CLEARWATER
vs.
SOLOMON MERRIDETH *et al.* } Ass'p't.

The clerk of the U. S. circuit court for the district of Indiana will please immediately issue a summons for def'ts in assumpsit in the above entitled cause, and lay the damages at $20,000. Dec. 21, 1859.

McDONALD & WALKER,
Pl'ff Att'y.

Whereupon, on the day and year last aforesaid, there was issued out of the clerk's office of said court a writ of summons, as follows, to wit:

The President of the United States of America to the marshal of the district of Indiana, greeting:

You are hereby commanded to summon Pleasant Johnson, Solomon Merredith, Thomas Tyner, and Caleb B. Smith, citizens of the State of Indiana, if they may be found in your district, to be and appear before the circuit court of the United States for the district of Indiana, to be holden before the judge thereof, at Indian-
8 apolis, in said district, on the third Monday in May next, to answer unto Hiram Clearwater, a citizen of the State of Ohio, in a plea of assumpsit, damages twenty thousand dollars, ($20,000.) And have you then and there this writ.

Witness honorable Roger B. Taney, chief justice of the
[L. S.] Supreme Court of the United States, and the seal of the circuit court of the United States for the district of Indiana, hereunto affixed, at Indianapolis, this 21st day of December, in the year of our Lord one thousand eight hundred and fifty-nine.

H. BASSETT, *Clerk*,
Per JNO. H. REA.

Which said writ of summons was then and there delivered to the marshall of said district, and by him afterwards duly returned to the office from where it issued, endorsed as follows, to wit:

Served this process upon Solomon Merredith and Caleb B. Smith, two of the within named defendants, by reading and personally delivering to each a copy hereof, at Indianapolis, this 21st day of December, A. D. 1859.

JOHN L. ROBINSON, *Marshal*,
By GEO. McQUAT, *Deputy*.

Served this process upon Thomas Tyner, one of the within named defendants, by reading and personally delivering to him a copy hereof, at Tyner city, Marshal co., Indiana, on the twenty-third day of December, A. D. 1859.

JOHN L. ROBINSON, *Marshal*,
By C. S. DYER, *Deputy*.

9 Served this process upon Pleasant Johnson, one of the within named defendants, by reading and personally delivering to

him a copy hereof, at Dublin, Fort Wayne co., Indiana, on the 28th day of December, A. D. 1859.

JOHN L. ROBINSON, *Marshal*,
By GEO. RARESHEID, *Deputy*.

Marshal's fees for serving this writ.

Railroad fare	$9 00	Livery stable sleigh, 3 days ·	$12 00
Hotel, seven days ...	9 00	7 days' time	14 00
Omnibus	1 50	Service on four	8 00
Four copies	4 00	Return	10
	23 50		34 10

Total ..... $57 60.

Rec'd from Messrs. McDonald & Walker, on ac. marshal fees, twenty-five dollars, Dec. 21, 1859, and paid the same out on ac. expenses in part incurred in serving the above.

C. S. DYER.

And afterwards, to wit, on the twenty-second day of May, in the year of our Lord one thousand eight hundred and sixty, at a circuit court begun, continued, and holden at Indianapolis, in said district of Indiana, before the honorable Elisha M. Huntington, district judge of the United States for said district of Indiana, comes now the plaintiff, by his attorneys, and upon his motion the defendants are ruled to plead herein on or before to-morrow morning. And day is given. And afterwards, to wit, on the twenty-third day of May, in the year aforesaid, at the circuit court of the United States begun and holden as aforesaid, before the honorable judge aforesaid, come the parties, by counsel, and the defendants file their five several pleas to the plaintiff's declaration, in the words and figures following, to wit:

UNITED STATES, *District of Indiana*:

In the United States circuit court.

HIRAM CLEARWATER
vs.
SOLOMON MERREDITH *et al.*

The said defendants come and defend, &c., and for plea to said action say they did not undertake and promise in manner and form as in said plaintiff's declaration is alleged, and of this they put themselves upon the country.

And plaintiff oath likewise.

And for further and second plea in this behalf the said defendants say actio non, because they say that heretofore, to wit, at the term of the United States circuit court for the district of Indiana, the said plaintiff commenced an action of assumpsit in the said court against Solomon Merrideth, Pleasant Johnson, and Thomas Tyner, defendants

herein, the said Caleb B. Smith, one of the said defendants, being then a citizen of the State of Ohio, of which State the said plaintiff was also then a citizen, for not performing the very same identical promises and undertakings, and each and every one of them in said plaintiff's declaration mentioned.

And such proceedings were thereupon had in said cause in said court that afterwards, to wit, at the Nov. term, 1859, of said
11 court, the said plaintiff came into the said court in his own proper person, and confessed that he would not further prosecute his said suit against the said defendants, but from the same altogether withdraw himself; therefore it was then and there considered by the said court that the said plaintiff should take nothing by his said suit, and that the defendants should go hence, &c., without day, as by the record and proceedings thereof still remaining in the said court more fully and at large appears; which said judgement still remains in full force and effect, not in the least reversed, satisfied, or made void, and this said defendants are ready to verify: wherefore they pray judgement, &c.

And third plea in this behalf, said defendants said actis non, because they say that heretofore, to wit, at the —— term, A. D. 1858, at the said United States circuit court for the district of Indiana, the said plaintiff impleaded the said Solomon Merredith, Pleasant Johnson, and Thomas Tyner, defendants, the said Caleb B. Smith being then a citizen of the State of Ohio, of which State said plaintiff was also a citizen, in the said court for the non-performance of the same identical promises and undertakings in the said declaration mentioned; and the said defendants pleaded to said action in bar, and issue was duly made and joined between said parties on the merits of said controversy. And thereupon such proceedings were had in said court in said cause that afterwards, to wit, at the November term, 1859, of said court, the issues being joined between said parties
12 as aforesaid, the same were submitted to a jury for trial, who were duly sworn in open court to try the same; and thereupon the evidence on the merit in said cause was submitted to the jury, and the said jury, having been charged and instructed by the court, retired from the bar of the court to deliberate upon their verdict; and while the said jury were absent from the court room in charge of an officer of said court, and were consulting and deliberating of and concerning the verdict they should render in said cause, the said plaintiff, by his attorney, asked permission of the court to suffer a non-suit in said cause, to which said defendants objected; but notwithstanding said objection, the said court permitted said plaintiff to suffer a non-suit, and the said plaintiff was thereupon non-suited after the jury had retired from the bar, and while they were there absent from the court room deliberating upon their verdict. And it was thereupon adjudged by the court that said plaintiff should take nothing by his said suit, and that said defendants should go hence without day, as the record of proceedings thereof still remaining in said court more fully and at large appears, which said judgement still remains in full force and effect, not in the least reversed

or made void. And this said defendants are ready to verify; wherefore they pray judge't, &c.

The said defendants for further and fourth plea in this behalf say actio non, because they say that the said Cincinnati, Cambridge,
13 and Chicago Short Line Railway Company, in plaintiff's declaration specified, and which issued the stock in said agreement specified, was a corporation of the State of Indiana, organized under and by virtue of a general law of said State, entitled "An act to provide for the incorporation of railroad companies," approved May 10th, 1852; and said company had no other charter and possessed no other powers than those which were conferred upon it by said law. Said defendants further aver that before the execution of said agreement, to wit, on the 6th day of May, 1853, the said plaintiff agreed with the Cincinnati, Cambridge, and Chicago Short Line Railway Co. to sell to said Co. the said tract of land in said agreement specified for and in consideration of the sum of ten thousand dollars of the capital stock of said company, which it was agreed should be issued by said Co. to said plaintiff for said land; but said sale was made only upon the condition that said Co. should furnish to said plaintiff a guaranty that said stock should be at par within one year from the completion of said road. Said defendants further aver that said agreement to furnish a guaranty that said stock should be worth par was made by the officers of said Co. with said plaintiff secretly, without the knowledge or consent of the stockholders of said Co., and without the same being in any manner made known publicly; and the said agreement in plaintiff's declaration specified was executed by said defendants in pursuance of said agreement above specified, upon the request
14 of the said plaintiff and the said company, and for no other consideration whatever. Defendants further aver that after said plaintiff so sold said land to said Co., and after defendants executed said agreement, a large amount, to wit, one hundred thousand dollars in value of real estate, was sold and conveyed to said company by divers persons for the capital stock of said Co., and the said persons who so sold and conveyed said real estate to said Co. for stock knew at the time they so sold the same to said Co. that said plaintiff had sold said tract of land in said agreement specified to said Co. for ten thousand dollars of the capital stock of said Co.; but they were wholly ignorant of the fact that said secret guaranty of the value of said stock had been executed and delivered to said plaintiff; but said persons knowing said plaintiff to be a shrewd business man and a man of sound judgement, and believing that he had sold said land to said Co. for their stock without any other inducement thereto than his judgement of the future value of said stock, were induced by their confidence in the judgement of said plaintiff to sell the said lands to said Co. for stock, and this they are ready to verify, wherefore they pray judgment. And for a further and fifth plea in this behalf, the said defendants say actio non, because they say that after the execution of said written agreement, and before the expiration of two years from the first day of October, 1853, to wit, on the 13th day of April, 1854, the stock of the said Cincinnati, Cambridge, and Chicago Short

15 Line Railroad Company was merged and consolidated with the stock of another railroad corporation of the State of Indiana, known and designated as the Cincinnati, New Castle, and Michigan R. R. Company; both of which corporations were organized and formed under and in pursuance of the act of the general assembly of the State of Indiana, entitled "An act to provide for the incorporation of railroad companies, approved May 11, 1854;" the said two roads being connecting and intersecting road, and which consolidation was made with the consent of the stockholders and directors of both of said companies, and by said consolidation the stock of both of said companies was merged and consolidated, making one joint stock company of the said two companies, and the said consolidated Co. assumed the corporate name of the Cincinnati and Chicago Railroad Company. And afterwards, to wit, on the —— day of August, 1854, the said Cincinnati and Chicago Railroad Company was merged and consolidated with another corporation of the State of Indiana, known and designated as the Cincinnati, Logansport, and Chicago Railway Co., and which last named Co. was then constructing a road which intersected with the said Cincinnati and Chicago R. R. Co.; and by the said consolidation the stock of the said two companies was merged and consolidated, forming one joint stock Co. out of said two Cos.; and said consolidation was made with the consent of the directors and stockholders of the said two companies, and with
16 the consent of said plaintiff; and said consolidated Co. assumed the corporate name of the Cincinnati and Chicago R. R. Co. And said defendants aver that by reason of the said consolidation above specified, the said stock of the Cincinnati, Cambridge, and Chicago Short Line Railway Co., in said agreement specified, was destroyed and rendered wholly worthless and of no value; and this they are ready to verify, wherefore they pray judgement. And now come also Solomon Meredith and Thomas Tyner, two of said defendants, and for plea of said action say actio non, because they say that after the execution of said agreement, and before the expiration of two years from the first day of October, 1853, to wit, on the —— day of April, 1854, the stock of the said Cincinnati, Cambridge, and Chicago Short Line R. R. Co. was merged and consolidated with the stock of the Cincinnati, New Castle, and Michigan R. R. Co., another corporation of the State of Indiana, said road being connected and intersecting with each other, with the consent of the directors and a large majority of the stockholders of said Cos.; and by said consolidation the stock of said two companies was merged and consolidated, working one joint stock company of said two companies, and which consolidated company assumed the name of the Cincinnati and Chicago R. R. Co. And afterwards, to wit, on the 31st day of August, 1854, the said Cincinnati and Chicago R. R. Co. merged and consolidated their stock with the stock of another
17 corporation of the State of Indiana, known and designated as the Cincinnati, Logansport, and Chicago R. R. Co., the roads of said two companies being connected and intersecting each other; and the stock of the said two companies, with the consent of the di-

rectors thereof and of a large majority of the stockholders, were merged and consolidated, making one joint stock company of said two companies, and which last consolidated company assumed the name of the Cincinnati and Chicago R. R. Company. And said defendants aver that both of said consolidations were made against the consent and in opposition to the wishes of these defendants and notwithstanding they objected. And these defendants aver that the said consolidations above specified wholly ruined the said stock of the said Cincinnati, Cambridge, and Chicago Short Line R. R. Co. in said agreements specified, and rendered the same wholly worthless and of no value; and this said defendants are ready to verify, wherefore they pray judgement.

SMITH & SMITH & O. P. MORTON, *for Def'ts.*

And day is given.

And afterwards, to wit, on the twenty-sixth day of May, in the year aforesaid, at the circuit court, begun and holden as aforesaid before the honorable judge aforesaid, come the parties by counsel, and the plaintiff files demurrer to defendants' pleas herein, in these words, to wit:

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vs.
SOLOMON MERREDITH *et al.*

The plaintiff, as to the plea by the defendants above secondly pleaded, says precludi non, because the same and the matters therein contained in manner and form as the same are therein set forth are not sufficient in law to bar or preclude the plaintiff from having and maintaining his action aforesaid; wherefore he prays judgement, &c.

And for special cause of demurrer the plaintiff states the following, viz:

1st. The defendants do not traverse the *assumpsit* laid in the declaration.

2d. That they do not confess or deny the contracts stated in the declaration.

3d. The plea is no answer to the declaration as any court thereof.

4th. By the plea it appears that the action therein pleaded was not between the same parties as this action.

And the plaintiff, as to the plea by the defendants thirdly above pleaded, says precludi non, because he says that said plea and the matters therein contained in manner and form as the same are above in that plea set forth are not sufficient in law to bar or preclude the pl'ff from having or maintaining his action aforesaid; whereupon he prays judgement, &c. And the pl'ff, as to the plea by the def'ts 4thly above pleaded, says precludi non, because he says that said plea and the matters therein contained in manner and form as the
19 same are above pleaded are not sufficient in law to bar or preclude the pl'ff from having and maintaining his action aforesaid; whereupon he prays judgement, &c.

And as to the plea by the said Solomon Merredith and Thomas

Tyner by them seperately above pleaded, the plaintiff says precludi non, because he says that the same, and the matters therein contained in manner and form as the same are above pleaded, are not sufficient in law to bar or preclude the plaintiff from having and maintaining his action aforesaid against said defendant, and this he is ready to verify, wherefore he prays judgement, &c.

McDONALD & WALKER,
Pl'ff's Att'y.

And day is given. And afterwards to wit, on the seventheenth day of December, in the year aforesaid, at the circuit court begun and holden as aforesaid, before the honorable Samuel H. Treat, district judge of the United States, come the parties by counsel, and after argument on demurrer the court take the same under advizement. And day is given. And afterwards, to wit, on the twenty-first day of December, in the year aforesaid, at the circuit court begun and holden as aforesaid, before the honorable judge aforesaid, come the parties by counsel, and the court being sufficiently advised, sustain the demurrer to 2nd, 3d, and 6th pleas, and overruled the demurrer to the 4th and 5th pleas, and this cause is continued to the 22nd day of January, A. D. 1860. And day is given the parties.

20 And afterwards, to wit, on the day and year last aforesaid, the plaintiff, by his attorneys, files demurrer to 5th plea herein as follows, to wit:

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And the plaintiff, as to the plea above 5thly pleaded, says precludi non, because he says that said plea, and the matters therein contained in manner and form as the same are therein set forth, are not sufficient in law to bar the pl'ff from mainting and having his action aforesaid; wherefore he prays judgement, &c.

PUGH & McDONALD,
Pl'ff's Att'ys.

And afterwards to wit, on the twenty-second day of January, in the year of our Lord one thousand eight hundred and sixty-one, at the circuit court begun and holden as aforesaid, before the honorable judge aforesaid, come now the parties by counsel, and the plaintiff files replication to 4th plea to declaration herein, in these words, to wit:

HIRAM CLEARWATER
vs. } Ass'p't.—U. S. Cir. Court, N. T. 1860.
SOLOMON MERREDITH *et al.*

And the plaintiff, as to the plea of the defendants fourthly above pleaded, says that the undertaking of the defendants, mentioned in the declaration, was not made by them, the said defendants, in pursuance and consideration of the supposed agreement mentioned in the said plea between the said Cincinnati, Cambridge, and

21 Chicago Short Line Railway Company and him, the said plaintiff, in manner and form as by the said plea alleged. And this he prays may be enquired of by the country, and the defendants do the like.

PUGH, McDONALD & WALKER,
Pl'ff Att'y.

And the plaintiffs, as to the plea of the defendant fifthly above pleaded, says that the stock of the said Cincinnati, Cambridge, and Chicago Short Line Railway Company issued to him, the said plaintiff, as by the defendants in their undertaking recited, was not destroyed and rendered wholly worthless and of no value by reason of the supposed consolidation of the said company with the Cincinnati, Newcastle, and Michigan Railway Company and with the Cincinnati, Logansport, and Chicago Railroad Company, as in the said plea mentioned, with the consent of him, the said plaintiff, in manner and form as by the said plea alleged. And this he prays may be enquired of by the country, and the defendants do the like.

PUGH, McDONALD & WALKER,
Pl'ff's Att'ys.

And by agreement of parties this cause is continued. And afterwards, to wit, on the twenty-eight day of May, in the year aforesaid, at the circuit court begun and holden as aforesaid, before the honorable Elisha M. Huntington, district judge aforesaid, come the parties by counsel, and by agreement this cause is continued. And afterwards, to wit, on the fourth day of December, in the year A. D. 1861,
22 at the circuit court begun and holden as aforesaid, before the honorable Samuel H. Treat, judge aforesaid, come the parties by counsel, and the plaintiff files demurrer to replication to 5th plea herein, in these words, to wit:

HIRAM CLEARWATER
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SOLOMON MERREDITH *et al.*
} Cir. C't U. S., Dis't Ind., Nov. 7, 1861.

Comes now the defendants and say that the replication of the plaintiff to the plea by defendants fifthly above pleaded is not sufficient to entitle the plaintiffs to have and maintain his action aforesaid against the defendants, and this they are ready to verify; wherefore they pray judgement, &c.

And for cause of demurrer defendants assign—

1st. That said replication is neither a traverse nor confession of the consolidation of said railroad companies, as alleged in said plea.

2d. Said replication does not deny that the consolidation of said railroad companies, as in said plea alleged, nor that by reason of such consolidation, the said stock was rendered of no value.

3d. Said replication is augmentative and not positive in its averments.

USHER & HENDRICKS,
Att'ys for Deft's.

And the pl'ff says that said replication is sufficient in law; whereupon he prays judgment, &c.

PUGH & McDONALD,
Pl'ff's Attorn'ys.

And upon motion, it appearing that a demurrer to 5th plea, filed December 21, 1860, is not to be found, it is filed *nunc pro tunc.*

23 And day is given. And afterwards, to wit, on the sixth day of December, in the year aforesaid, at the circuit court begun and holden as aforesaid, before the honorable judge aforesaid, come the parties by counsel, and argument being heard upon demurrer to replication to 5th plea, further day is given the parties.

And afterwards, to wit, on the tenth day of December, in the year aforesaid, at the circuit court begun and holden as aforesaid, before the honorable judge aforesaid, come the parties, and the court being sufficiently advised, sustain the demurrer to replication to 5th plea, and day is given. And afterwards, to wit, on the eleventh day of December, in the year aforesaid, at a circuit court begun and holden as aforesaid, before the honorable judge aforesaid, come the parties by counsel, and the plaintiff files an amendment to the replication to 5th plea herein, in these words, to wit:

And the plaintiff, as to the plea of the defendants fifthly above pleaded, says that the said defendants, at the time when the several causes of action in the declaration mentioned accrued to him, the said plaintiff, to wit, at the district of Indiana aforesaid, of their own wrong, and without the cause in their said plea alleged, neglected and refused to perform their several promises and undertakings in the introductory part of the said plea admitted, and the non-performance whereof is, by the said plea, attempted to be justified in man-

24 ner and form as he, the said plaintiff, hath above complained against them. And this he says may be enquired of by the country.

DAVID McDONALD, *Pl'ff's Att'y.*

And day is given. And afterwards, to wit, on the twelvth day of December, in the year aforesaid, at the circuit court aforesaid, before the honorable judge aforesaid, come the parties by counsel, and the defendants file demurrer to amended replication to 5th plea, in these words, to wit:

SOLOMON MERREDITH *et al.*
ats. } Assumpsit.
HIRAM CLEARWATER.

The defendants came, and for rejoinder to the replication to the plea of said defendants fifthly above pleaded, say actio non, because they say that the said replication is wholly insufficient in law to entitle the plaintiff to have and maintain his said action against said defendants, and this they are ready to verify; wherefore they pray judgement, &c. And for special causes of demurrer the defendants set down and show to the court the following, viz:

1st. Because said replication is not a traverse in direct terms of either the actual consent of the plaintiff to the consolidations or of the consolidations themselves, as alleged, which are the material matters alleged in the plea.

2d. Because said replication is a traverse of an immaterial matter (the injury and destruction of the stock by the consolidations) and does not traverse the gist of the plea, the consolidations or
25 the consent of the plaintiff.

3d. The replication is augmentative in this, that it merely traverses that the stock was injured or destroyed by the consolidation, which is merely a consequence flowing from the acts that of themselves, by consent of the plaintiff, put the stock into a different character than that guarantied.

4th. If, as the plaintiff claims, the replication puts in issue the consolidations, and the plaintiffs consent thereto, it is double in that respect, as either is an issuable, and should have been singly traversed.

HENDRICKS, NEUMAN & USHER,
Def'ts' Att'ys.

And the plaintiff says that said replication to said fifth plea is sufficient in law for the plaintiff to have and maintain his said action; wherefore he prays judgement, &c.

PUGH & McDONALD,
Pl'ff's Att'ys.

And the court being sufficiently advised, sustain said demurrer. Whereupon, on motion and by leave of court, the plaintiff withdraws joinder in demurrer and files an amended replication to 5th plea, in these words, to wit:

CLEARWATER *vs.* MERREDITH *et al.* } Ass'p't.

And the plaintiff, as to the plea of the defendants fifthly above pleaded, says that he ought not, by reason of anything therein alleged, to be barred or precluded from having and maintaining his
26 aforesaid action against the defendants, because he says that the said stock of the Cincinnati, Cambridge, and Chicago Short Line Railway Co. was not destroyed, either in whole or in part, nor was the same rendered worthless and of no value, in manner and form as the defendants by their said plea have alleged; and this he prays may be inquired by the country.

PUGH & McDONALD,
Pl'ff's Atto'ys.

And the defendants files demurrer thereto, in these words, to wit:

SOLOMON MERREDITH *et al.* *vs.* HIRAM CLEARWATER. }

The defendants come, and for rejoinder, the replication of the plaintiff to the plea of the defendant's fifthly above pleaded, say action on,

because they say said replication to said plea is insufficient in law to entitle the plaintiff to have and maintain their said action against the defendants, and this they are ready to verify; wherefore they pray judgement, &c.

And for causes of demurrer the defendants set down and show to the court the following, viz:

1. The plea sets up the traversable facts of the consolidation of the stock of the Cincinnati, Cambridge, and Chicago Short Line Railway Co. with the stocks of other railway companies, which are the only traversable facts in the plea which are neither admitted nor denied by the replication.

2d. The plea sets up the consolidations of the stocks therein described with the consent of the plaintiff, either of which, if
27 correct, is motioned is an issuable fact. and the replication is a denial of both, and is therefore double.

3d. The replication is informal, inasmuch as it does not deny some one of the issuable facts set up in the plea.

HENDRICKS, NEUMAN & USHER,
Def'ts' Att'ys.

To which the plaintiff files joinder, in these words, to wit: And the plaintiff says that said replication is sufficient in law; wherefore he prays judgment, &c.

D. McDONALD,
Pl'ff's Att'y.

And day is given.

And afterwards, to wit, on the thirteenth day of December, in the year aforesaid, at the circuit court of the United States, begun and holden as aforesaid, before the honorable judge aforesaid:

CLEARWATER
vs.
MERREDITH *et al.*

Now again come the parties by their attorneys, and the court, being advised of the premises, sustain said last-mentioned demurrer. It is therefore considered that said last-named amended replication is not sufficient in law for the plaintiff to have or maintain his action aforesaid against the defendants; that the plaintiff take nothing by his said suit, and that the defendant go hence without day and recover of the plaintiff their costs and charges by them in their defence in this behalf laid out and expended.

28 And thereupon, on the 18th day of December A. D. 1861, the plaintiff presents a writ of error to the Supreme Court, a copy of which is filed in the clerk's office of said court, and a citation is issued for the defendant in error, signed by the judge; and the said plaintiffs having tendered a bond in the sum of $200 with sufficient security, the said writ of error is allowed.

29 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Indiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment in a plea which is in said United States circuit court for said district, before you, between Hiram Clearwater, plaintiff, and Solomon Meredith, Caleb B. Smith, Pleasant Johnson, and Thomas Tyner, defendants, a manifest error hath happened, to the great damage of the said Hiram Clearwater, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and
30 custom of the United States should be done.

Witness the honorable Roger B. Taney, chief justice of the said Supreme Court of the United States, this 18th day of
[L. S.] December, in the year of our Lord eighteen hundred and sixty-one, and of the independence of the United States the

JNO. H. REA, *Clerk.*

I allow the above writ of error.

S. H. TREAT, *Dist. Judge.*

DEC'R 18, 1861.

31 UNITED STATES OF AMERICA, *ss:*

To Solomon Meredith, Caleb B. Smith, Pleasant Johnson, and Thomas Tyner, greeting:

You are hereby commanded, cited, and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the office of the clerk of the circuit court of the United States for the district of Indiana, wherein Hiram Clearwater is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Roger B. Taney, chief justice of the Supreme Court of the United States, this 18th day of December, A. D. 1861.

S. H. TREAT, *Dist. Judge.*

Service of the foregoing citation acknowledged this 24th day of December, 1861.

THOS. A. HENDRICKS,
Of At'ys for Deft's.

32 THE UNITED STATES OF AMERICA, *District of Indiana, ss:*

I, John H. Rea, clerk of the circuit court of the United States for the 7th judicial circuit and district of Indiana, do hereby certify the above and foregoing to be a true, correct, and complete copy of the papers filed and proceedings had, and that the writs of error and citation hereto attached are the original writs issued in the above entitled cause; all of which now appears of record in my office.

In testimony whereof, I have hereto set my hand and affixed the [L. S.] seal of said court, at Indianapolis, this December 23d, 1861, and of the independence of the United States the 86th.

JOHN H. REA, *Clerk.*

Transcript, $10. Paid by Judge McDonald.

Filed February 21, 1862.

33 IN THE SUPREME COURT OF THE UNITED STATES.

HIRAM CLEARWATER, plaintiff in error,
against
SOLOMON MERIDETH, PLEASANT JOHNSON, CALEB B. SMITH, and THOMAS TYNER, defendants.

And now comes the said Hiram Clearwater, by George E. Pugh, his attorney, and says that in the record of the proceedings and judgment of the circuit court of the United States for the district of Indiana there is manifest error:

First. Because the said circuit court sustained the demurrer of the defendants to the replication of the plaintiff to their fifth plea.

Second. Because the said court sustained the demurrer of the defendants to the amended replication of the plaintiff to the same plea.

34 Third. Because the said court sustained the demurrer of the defendants to the second amended replication of the plaintiff to the same plea.

Fourth. Because the said court gave judgment for the defendants upon the whole record, when, by law, judgment should have been for the plaintiff.

Wherefore the said Hiram Clearwater prays that the judgment of the said circuit court may be reversed, with costs, and that he may be restored to all things which he has lost by reason thereof.

G. E. PUGH, *Attorney.*

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Supreme Court of the United States.

DECEMBER TERM, 1863.

No. 122.

HIRAM CLEARWATER,

vs.

SOLOMON MEREDITH ET AL.

The plaintiff assigns four errors, (p. 16 printed record,) but the 1st and 2d cannot avail him. The demurrer to the replication to the 5th plea was sustained, and then the plaintiff, by leave of the court, filed an amended replication, pages (11 and 12,) to which a demurrer was also sustained, and then the plaintiff withdrew his joinder in demurrer, and by leave of the court, filed a new replication, (pages 12 and 13.) The first amendment is not in fact an amendment, but, being complete in itself, is a substitute—and so of the 2d amendment—and as the plaintiff was entitled to but one replication to the plea, his first amendment was an abandonment of the original replication, and the 2d amendment abandoned the 1st amendment, so that the plaintiff stood upon the last as his replication; and the 1st and 2d demurrers and the rulings thereon are not before the court, but only the replication on p. 13 and the demurrer, and the rulings of the court in sustaining the same. The only question then, before this Court is, did the court below err in sustaining the demurrer to the replication to the 5th plea, and rendering judgment for the defendants.

The declaration shows that on the 6th of May, 1853, the plaintiff sold 320 acres of Indiana land to the Cincinnati, Cambridge and Chicago Short Line Railway Company, for $10,000 of the capital stock of the Company at par, and the

Company did then agree to furnish to the plaintiff a guarantee that the stock should be at par within one year from the completion of the road; and on the 12th of July, 1853, the defendants, in pursuance of such agreement, and in consideration that the plaintiff would and did execute a conveyance of said land to Solomon Meredith, to whom the Company had sold the same, did, in writing, guaranty and promise the plaintiff that the stock issued to him should be worth par at the city of Cincinnati within one year from the time of the completion of the road from Cincinnati to New Castle, Indiana, and that the same should be completed within two years from the 1st of October, 1853; and the declaration then avers that the road was not completed within that time, nor was the stock worth par within one year from the 1st of October, 1855, nor at any time since that time.

For 5th plea (bottom of 7th page,) defendants say that before the expiration of said two years, to wit: on the 13th of April, 1854, the stock of said Company was merged and consolidated with the stock of another Indiana railroad, known as the Cincinnati, New Castle, and Michigan Railroad Company—that both of said corporations were organized and formed under the laws of Indiana, said roads being connecting and intersecting roads; that such consolidation was made with the consent of the stockholders and directors of both roads, and thereby the *stock of both became merged and consolidated*, making one joint stock company of said two companies, and said consolidated company assumed the name of the Cincinnati and Chicago Railroad Company. That afterwards in August, 1854, said Cincinnati and Chicago Railroad Company was merged and consolidated in like manner with another Indiana Railroad Company, known as the Cincinnati, Logansport, and Chicago Railroad Company, then constructing a road to intersect with said Cincinnati and Chicago railroad; and said consolidated company assumed the name of the Cincinnati and Chicago Railroad Company; that said consolidations were made by the consent of the directors and stockholders of said companies, *and with the consent of the plaintiff;* and that by reason of such consolidations the stock of said Cincinnati, Cambridge, and Chicago Short Line Railroad Company was *destroyed* and rendered of no value.

To that plea the plaintiff replied (p. 13,) "that the said stock of the Cincinnati, Cambridge, and Chicago Short Line Railway Company was not destroyed, either in whole or in part, nor was the same rendered worthless and of no value in manner and form as the defendants by their said plea have alleged."

To that replication the defendants specially demurred, (p. 13 and 14,) assigning three causes of demurrer.

1*st*. The plea sets up the traversable facts of the consolidation of the stock of the Cincinnati, Cambridge, and Chicago Short Line Railroad Company with the stocks of other railway companies, which are the only traversable facts in the plea which are neither admitted nor denied by a replication.

2*d*. The plea sets up the consolidations of the stocks therein described, with the consent of the plaintiff, either of which, if correct, is an issuable fact, and the replication is a denial of both, and is therefore double.

3*d*. The replication is informal, inasmuch as it does not deny some one of the "issuable facts set up in the plea."

The court sustained the demurrer, and the plaintiff not replying further, rendered judgment for the defendants.

If the replication puts in issue only the question whether the stock was destroyed and rendered worthless, then it presents an immaterial issue; for if the stock was merged with the stock of other companies, and thereby made to represent another interest and a different property, which the defendants had not agreed to guaranty, and that by the consent of the plaintiff, then the defendants were discharged from their contract, although the stock may not have been impaired in its value. By the two consolidations and mergers, the $10,000 of stock in the Cincinnati, Cambridge, and Chicago Short Line Railroad Company came to be 200 shares in the Cincinnati and Chicago Railroad Company, and was evidence of an interest and property in that road of the nominal value of $10,000—a new and different corporation or company, and constructing a road of greater length. The stock of such a company the defendants had not agreed to guaranty; it was not within their contract; and they were as well discharged whether the stock was still of the same market value at Cincinnati or became of no value whatever. To bind the defendants, it would require a new contract, in which they would agree to guaranty the value of the stock in its new position, and representing the new interest. The defense rests upon the consolidation and plaintiff's consent, thereby changing and merging the thing guarantied. (See argument and authorities on this point, post.) The effect upon the value, whether the stock was worth more or less in its new position, is immaterial; and if the replication traverses that fact only, then it raises an immaterial issue; and if the traverse was of an immate-

rial point, it needs no argument or authority to support the ruling of the court in sustaining the demurrer, "for the obvious reason (as the authors say) that what is immaterial cannot decide the controversy."

But the plaintiff claims that his replication is a more general traverse; and puts in issue, first, the consolidation of the companies and the stock; second, the consent of the plaintiff; and third, that the stock was thereby rendered of no value. (See Mr. Pugh's argument, 1st point, page 10; and pages 17 and 18.) Thus understanding the replication, it is double; and for that reason the demurrer was properly sustained.

It is not claimed that the traverse must be of a single fact, "since two or more distinct facts may be, and often are, necessary to constitute one complete point or ground of complaint or defense," but that the traverse must be confined to a single point. The difficulty in practice is to determine what is a single point, as contradistinguished from a single fact. Gould says: "The meaning of the rule is, that when the pleading, on one side, consists of several distinct and material points, all of which are necessary to its legal sufficiency, the adverse party is allowed to traverse only one of them. For in every such case, a denial of *one* of them is in law a sufficient answer to the whole; and he may traverse which of them he pleases;" and to illustrate, he says: "If therefore, in trespass for false imprisonment, the defendant justifies under a capias directed to the sheriff, and a warrant from the sheriff directed to himself, the plaintiff may traverse either the capias or the warrant, but should not traverse both. For the denial of either of them is a sufficient answer to the plea; since the capias, without the warrant, or the warrant, without the capias, would be no justification; and the traverse of both would, in effect, tender two issues instead of one, upon one and the same plea."

Gould's Pleading, ch. vii, sec. 49 and 50, p. 377.

The case given by Stephen on Pleading, and cited by Mr. Pugh, p. 18 of his argument, is considered by Gould, chap. 7, sec. 52. He says: "Of this case it may be observed, that the defense to which the traverse applied consisted of three distinct points.

1. The existence of a prescriptive *right of common.*
2. The defendant's title to share in that right, as tenant of a manor or lordship.

3. That the particular beasts in question *were entitled to common.* The replication applied to the last point only, viz, that the beasts *were entitled to common.* But to entitle them to common, in the defendant's right, they must have been, as alleged in the plea, his own cattle—and also *levant and couchant* on his tenement—and commonable cattle.

These last *three* facts, therefore, the plaintiff precisely traversed, and the court held that the traverse was not *double,* inasmuch as it embraced only the *simple point* that the cattle were *entitled to common.*

The facts stated in the defendant's plea do not go to make but one point; they make two material points. 1st, the consolidation of the stock; and 2d, that the plaintiff consented thereto—but both points necessary to "the legal sufficiency of the plea"—both points constituting but one defense. Aptly illustrative is the analagous case, "if the defendant pleads title in a stranger, and justifies as servant to the latter, and by his command, the plaintiff may traverse the *title,* or the *command,* but should not traverse *both.*"

Gould's Pl., chap. 7, sec. 50, 8 Co., 67 b.

The court allowed a traverse either of the title in the stranger, or his command to his servant, but not both; and so in this case, the traverse was allowed of the consolidation of the stock, or of the plaintiff's authority or consent, but not both.

In Tubbs *vs.* Caswell & Pettit, 8 Wend., 129, upon error from the supreme court, it was held "that a plea that the promise declared on was made by defendants and a third person jointly, and that plaintiff had released the third party, a reply denying the joint promise and the release was bad for duplicity."

In Tuttle *vs.* Smith, 10 Wend., 386, it was held that "where to a plea of the statute of limitations the plaintiff replied the suing out of process, and a promise within six years previous to such process, a rejoinder denying both the suing out the process, and the alleged promise was bad for duplicity."

The case of Strong *vs.* Smith, 3 Caines, 160, held to have been overruled by Tubbs *vs.* Caswell in the highest court—(that overruled case is strongly pressed by plaintiff, p. 23 of his argument.) In these two cases the rule is fully considered, and some of the authorities reviewed.

The plaintiff's 4th assignment of error is that "the court gave judgment for defendants upon the whole record, when

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by law judgment should have been for the plaintiff;" but, obviously, he overlooked the general issue, and the issue of fact upon the 4th plea, which required a trial before judgment could have been rendered for plaintiff, although the judgment upon the demurrer to the replication to the 5th plea had been in his favor; whilst on the other hand judgment upon that demurrer being for defendants, a final judgment in their favor was inevitable, as then a plea in bar was unanswered.

But it is supposed that the plaintiff intends by this assignment to say that the 5th plea is itself bad ; that the demurrer goes back to the plea, and judgment upon the demurrer should have been in his favor; and it is proper, therefore, to consider that plea, submitting however that the demurrer being special, and for causes specified, does not search the record as would a general demurrer.

The defendants do not believe it to be material, in determining the sufficiency of the 5th plea, whether in the contract described in the declaration, the defendants were original promisors, or only sureties; yet they submit that the declaration shows that it appears by the recitals in the contract that they gave the guarantee in executing no contract or arrangement of their own, nor for any consideration received by themselves, but only for the purpose of carrying out an agreement made by the railroad company two months before, and in pursuance of that agreement; that the guaranty was given for the benefit of the plaintiff and the railroad company, and not at all for their own benefit, and only to complete the arrangement between the plaintiff and the company, and that therefore they are but guarantors. Nor is the force of these facts affected by the fact that the plaintiff received a guarantee less comprehensive than he might have demanded under his agreement with the company. It was competent for him to demand a general guarantee of the value of the stock, or to receive it limited to the city of Cincinnati; but in either case the guarantors could but execute the agreement of the principal.

Nor is it material in deciding upon the character of the contract, that the conveyance of the land was made by the plaintiff to Meredith, instead of the railroad company—for the declaration shows that Meredith had in the mean time bought it of the company. The conveyance to Meredith was not the consideration for the guarantee—the consideration for the sale and conveyance to him was paid to the company—and having received his stock and guarantee, it was immaterial to plaintiff

whether he conveyed the land to the company or to its vendee. Plaintiff received nothing more for conveying to Meredith than he was entitled to for conveying to the company. The consideration for the guarantee was the original agreement between plaintiff and the railroad company.

If, then, for the benefit of the company, for a consideration received by the company, in pursuance of, and to execute an agreement between the plaintiff and company, and at the request of the company, the defendants did guaranty the value of the stock received by the plaintiff in payment for the land, and sustained loss and damage because of the breach of the guarantee, would not the company be liable to them for such loss and damage? Such loss, if paid by the company, must be paid out of the money paid in by the other subscribers, or money belonging to all the stockholders, and in making plaintiff's stock worth par would so much impair the other stock. It needs no argument or citation of authorities to establish that a company cannot directly, by a private arrangement, make the stock of one subscriber par out of the money paid by other subscribers. Such private arrangement would be inconsistent with the relation of equality which exists between the stockholders, and between them and the company, and would be fraudulent and void. If the arrangement could not be direct, could it be indirect, by interposing guarantors at the request of the company? These suggestions are in reply to the points made by plaintiff upon the 4th plea, which in fact is not before the Court—the same not being demurred to, but traversed.

But admitting the arrangement to be valid, and the contract of the guarantors binding, what is the defense made by the 5th plea? It is that after the contract was made and before the time limited for its execution, the plaintiff consented to a consolidation of the company with other companies, and the consolidation of the stock of the different companies. How is it material whether, under the laws of Indiana, a new corporation, or a joint stock company, was the result of the consolidation? The stock was merged in either event—it became mingled—and the identity and separate existence of the plaintiff's 200 shares became lost—the shares represented a new interest, and different property. Whether worth more or less in its new form and position is not material, nor is the question material whether the new organization increased or diminished the means for the enterprize. Nor is it material, although discussed by plaintiff, whether the new organization is responsible for the debts of the old companies. But it is material that the plaintiff did consent to a change of the subject of the contract, so that it is no longer identified, nor the same property which was guarantied. The

defendants did not guaranty 200 shares in the Cincinnati and Chicago railroad, and when the plaintiff consented to the change he abandoned the contract and guarantee.

The old corporation ceased to exist, and a new corporation came into existence, by the act of consolidation. The following authorities are cited as conclusive.

In the State vs. Bailey, 16 Ind., 46, the court says:

"The question of the power of corporations to consolidate has been discussed. It is held in Lauman *vs.* The Lebanon &c. Railroad Co., 30 Penn. State Rep. 42, that such consolidation can take place with the consent of the Legislature; that it amounts to a surrender of the old charters by the companies, the acceptance thereof by the Legislature, and the formation of a new corporation, out of such portions of the old as enter into the new; but that those stockholders in the old who do not enter into the new are entitled to withdraw their shares of the capital stock, and may enjoin till they are secured to them."

In McMahon *vs.* Morrison *et al*, 16th Ind., 172, the court held that, by the consolidation of the Cincinnati, Newcastle and Michigan Railway Company, "the Cincinnati, Logansport and Chicago Railway Company" and "the Cincinnati, Cambridge City and Chicago Short Line Railroad Company" into a new corporation, styled "The Cincinnati and Chicago Railway Company," pursuant to the act of the Legislature, the three corporations were dissolved, and passed out of existence, and a new corporation came into existence styled "The Cincinnati and Chicago Railroad Company," and that the new corporation came into existence "with property, liabilities, and stockholders, derived from" the corporations that then passed out of existence.

This decision is upon the effect of the consolidations now before this Court; is by the supreme court of Indiana, and upon the statutes of that State, and is conclusive upon the questions decided. The plaintiff then consented to the transfer of his stock from one company into another, whereby it ceased to be the property guarantied, and thereby the defendants were discharged.

If the condition of insured property be materially changed by consent of the insured, after insurance, and before loss, is not the insurer discharged? (Glen *vs.* Lewis, 20 Eng., L. & E., 364; Sillem *vs.* Thornton, 26 *ib.* 238; Stokes *vs.* Cox, 37 *ib.* 561.) If an insured vessel departs from the contemplated route, the underwriters are discharged, although the loss occurs after she has returned to the usual course.

4th Kent's Com., 312.

Arnould on Marine Insurance, 1st vol., 395, says: "It is not necessary to prove that the risk has been enhanced by the delay or deviation. The underwriter only undertakes to indemnify the assured upon the implied condition that the risk should remain precisely the same as it appears to be on the face of the policy, as interpreted by usage; if directly, by the act of the assured or his agents, this risk is in any degree *varied*, even though it may not be increased, the liability of the underwriter comes to an end by the breach of the condition on which alone he engaged to be liable at all: the true proposition, therefore, is that every voluntary and unnecessary departure from the prescribed course of the voyage, by which the risk is *varied*, is a deviation, whether the risk be thereby increased or not." "On the same principle it is not necessary, in order to discharge the underwriter, that the subsequent loss should be shown to be in any, even the remotest degree, connected with the prior deviation; the ship after the deviation may have returned in perfect safety to the direct course of the voyage, without having sustained the slightest injury in consequence of her departure from it, and yet on the ground that the risk incurred was thereby *varied* from the risk insured, the underwriter will be discharged from his liability for any loss subsequent to the deviation."

"In all cases whatever, a promisor will be discharged from all liability, when the non-performance of his obligation is caused by the act, or the fault, of the other contracting party."

Parsons on Contracts, vol. ii, p. 188.

The plaintiff claims, however, that the plea is defective, because it lacks the averment that the consolidation of the railroads was an act done without the consent of the defendants. Suppose the consolidation had been with the consent of both plaintiff and defendant, the effect would have been to rescind the contract, for the reason that the contract was no longer applicable to the new stock, and it would require a new contract to bind the defendants. A agreed to board B, and to receive pay in certain goods. Before the time of payment arrived, B allowed those goods to be seized and sold on execution against him. This was held a rescision of the contract, and A was allowed to recover on a general count, and without reference to the special contract.

Keys *vs.* Harwood, 2 Com. B., 905.

Where A agreed to write a treatise for a periodical publication, which before the treatise was completed the defendant discontinued, this was considered an abandonment of the contract by the defendant, and the plaintiff was allowed to recover on a *quantum meruit*, without completing the treatise. Planche *vs.* Colburn, 8 Bingham, 14 ; 2d Parsons on Contracts, p. 191, note M.

But were this not so, and were it held that if the defendants consented to the consolidation, they would still be liable on the contract; we answer that the fact of such consent is not a matter to be negatived by defendants, but the plaintiffs should reply that fact.

Chitty says, vol. I, p. 222, "It is also a general rule of pleading that matter which should come more properly from the other side, need not be stated. In other words it is enough for each party to make out his own case or defense. He is not bound to anticipate, and therefore is not compelled to notice and remove, in his declaration or plea, every possible exception, answer, or objection which may exist," &c. "So in assumpsit on a contract to transfer stock to the plaintiff on his order or request. The plaintiff stated a request, and averred that the defendant had not transferred ; and an objection being taken that the plaintiff should have averred that the defendant had not paid to plaintiff's order ; it was overruled, because the averment of payment to such order ought to come from the other side." Gould's Pleading, ch. 3, sec. 193–194, p. 155. Stephen on Pleading, p. 270. Clearly if the consent of defendants to the consolidation was material it should have been pleaded by plaintiff in reply to the 5th plea.

But it is insisted that inasmuch as the statute law of Indiana authorized railroads to be consolidated, that therefore the defendants contracted with a view to a possible consolidation, and are bound by it. The authorities cited do not go so far; they establish only the position that where the Legislature has reserved the right to amend the charter, the subscribing stockholders, by the act of subscription under such a charter, agree to snch increased liabilities as the Legislature may impose. It does not follow, however, that whoever contracts with a railroad company, or with a third party in relation to railroad property or stock, is subject to have his liabilities varied by any and all acts, which, according to law, the company may do. While constructing its road, a company, with a view to economy of expenditure or distance, or the better to accommodate the commerce and travel of the country, may change the location of its route. But in such case, could its contractors be held to their contracts, provided the change destroyed the mode by

which their compensation was to be ascertained, or materially increased the cost and difficulty of the work?

It may with safety be conceded that, with a view to the public interests and security, the Legislature shall reserve a controling power over corporations, and the liabilities of the stockholders; but it would be dangerous to allow that contracts may be modified, and risks and liabilities varied by any and all acts which corporations may do.

It is therefore respectfully submitted that the judgment of the circuit court ought to be affirmed.

THOMAS A. HENDRICKS.
Attorney for Defendants.

21 How 469
Inn Cas

Supreme Court of U. States.

December Term, 1863.

HIRAM CLEARWATER, Plaintiff in Error,

v.

SOLOMON MEREDITH, PLEASANT JOHNSON, CALEB B. SMITH, and THOMAS TYNER.

In Error to the Circuit Court for the District of Indiana.

Argument for the Plaintiff.

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In Error to the Circuit Court for the District of Indiana.

Argument for the Plaintiff.

647

Supreme Court of U. States.

December Term, 1863.

HIRAM CLEARWATER, Plaintiff in Error,

v.

SOLOMON MEREDITH, PLEASANT JOHNSON, CALEB B. SMITH, and THOMAS TYNER.

In Error to the Circuit Court for the District of Indiana.

Argument for the Plaintiff.

On the 21st of December, 1859, Clearwater, a citizen of Ohio, brought his action of assumpsit against the defendants above named, citizens of Indiana, complaining:

First Count. "For that whereas heretofore, on the twelfth day of July, in the year eighteen hundred and fifty-three, at the District of Indiana aforesaid, the defendants made and delivered to the plaintiff their certain agreement with him, in writing, of that date, whereby it was recited that the plaintiff, on the sixth day of May, in the year eighteen hundred and fifty-three, had contracted with the Cincinnati, Cambridge, and Chicago Short Line Railway Company for the sale of a tract of land situate in Wayne County, Indiana, lying on the National road, about four miles east of Cambridge City, and adjoining the lands of John Jacobs and others, containing three hundred and

twenty acres, for the consideration of ten thousand dollars, to be paid in the capital stock of the said Company at par, and, in such contract of sale, it was agreed that the said Company should furnish to the plaintiff a guaranty that the capital stock of the said Railway Company should be at par within one year from the completion of the entire line of the said road; and whereby, also, in consideration that the plaintiff had, with the consent of the said Company, and at the request of the defendants, executed a deed of conveyance for the said land to Solomon Meredith (to whom it had been sold by the said Company) the defendants guarantied the plaintiff that the stock of the said Company which had been issued to him, in pursuance of the said contract, should be worth par, in the City of Cincinnati, within one year from the time the said railroad should be completed from Cincinnati to Newcastle, Indiana, and that the said road should be completed within two years from the first day of October, in the year eighteen hundred and fifty-three.

"And the plaintiff says that the stock of the said Cincinnati, Cambridge, and Chicago Short Line Railway Company issued to him, in pursuance of the contract recited in the said agreement, consisted of two hundred shares, of the nominal value of fifty dollars each, of which said shares, at the time of the making and delivery of the said agreement by the defendants, and thence continually until the commencement of this suit, he was, and still is, the owner, to-wit, at the District aforesaid.

"And the plaintiff avers that the said road was not completed from Cincinnati to Newcastle, Indiana, within two years from the first day of October, in the year eighteen hundred and fifty-three, and that the stock issued to him, in pursuance of the contract mentioned in the said agreement, was not worth par, in the City of Cincinnati, within one year from the first day of October, in the year eighteen hundred and fifty-five, nor at any time thence, continually, until the commencement of this action; but, on the contrary, during all the time

aforesaid, the said stock was of no value in the City of Cincinnati—of all which premises the defendants had notice, to-wit, at the District aforesaid.

"By reason whereof, and according to the form and effect of their said agreement, so made and delivered to the plaintiff as aforesaid, the defendants, on the first day of October, in the year eighteen hundred and fifty-six, became liable to pay to the plaintiff the par value of the said stock so as aforesaid issued to him, namely, ten thousand dollars, that is to say, fifty dollars for each and every of the two hundred shares, to-wit, at the District aforesaid; and, being so liable, in consideration thereof, then and there undertook and faithfully promised the plaintiff to pay him the said sum of ten thousand dollars when thereunto afterwards requested.

"Yet the defendants, although often thereunto since requested, have not, nor has either of them, paid the said sum of ten thousand dollars, or any part thereof; but to pay the same, or any part thereof, have hitherto wholly refused, and do still refuse, to-wit, at the District aforesaid."

Second Count. "And, also, for that whereas heretofore, to-wit, on the sixth day of May, in the year eighteen hundred and fifty-three, at the District of Indiana aforesaid, the plaintiff agreed to sell to the Cincinnati, Cambridge, and Chicago Short Line Railway Company a certain other tract of land, situate in Wayne County, Indiana, lying on the National road, about four miles east of Cambridge City, and adjoining the lands of John Jacobs and others, containing three hundred and twenty acres, for the sum of ten thousand dollars in the capital stock of the said Company, upon condition that the said Company would furnish him, the said plaintiff, a guaranty that its capital stock should be at par within one year from the completion of the entire line of the road to be constructed by the said Company; *which agreement remained incomplete, and the title of the said last mentioned tract of land still vested in the plaintiff, because of the*

failure of the said Company to furnish him such guaranty as aforesaid, from the said sixth day of May until the twelfth day of July, in the same year, to-wit, at the District aforesaid. And thereupon, to-wit, on the said twelfth day of July, in the year aforesaid, at the District aforesaid, in consideration that the plaintiff, with the consent of the said Company, and at the request of the defendants, would execute a deed of conveyance for the said last mentioned tract of land to Solomon Meredith (to whom the same had been sold by the said Company) the defendants then and there guarantied and promised the plaintiff that the stock of the said Company issued to him, in pursuance of the agreement hereinbefore mentioned, should be worth par, in the City of Cincinnati, within one year from the time the said railroad should be completed from Cincinnati to Newcastle, Indiana, and that the said road should be completed within two years from the first day of October, in the year eighteen hundred and fifty-three.

"And the plaintiff says that, confiding in the said guaranty and promise of the defendants, he did then and there convey the said last-mentioned tract of land to the said Solomon Meredith, and accept two hundred shares (of the nominal value of fifty dollars for each share) in the capital stock of the said Company; which said shares of stock he, the said plaintiff, has ever since owned, and does still own, to-wit, at the District aforesaid.

"And the plaintiff avers that the said railroad was not completed from Cincinnati to Newcastle, Indiana, within two years from the first day of October, in the year eighteen hundred and fifty-three, and that the stock so as aforesaid issued to him, and by him accepted, was not worth par, in the City of Cincinnati, within one year from the first day of October, in the year eighteen hundred and fifty-five, nor at any time thence, continually, until the commencement of this action; but, on the contrary, during all the time aforesaid, the said stock was of no value in the City of Cincinnati—of all which premises the defendants had notice, to-wit, at the District aforesaid.

"By reason whereof, the defendants, on the first day of October, in the year eighteen hundred and fifty-six, became liable to pay to the plaintiff the par value of the said stock, so as aforesaid issued to him and accepted by him, namely, ten thousand dollars, that is to say, fifty dollars for each and every of the two hundred shares, to-wit, at the District aforesaid; and, being so liable, in consideration thereof, then and there undertook and faithfully promised the plaintiff to pay him the said sum of ten thousand dollars when thereunto afterwards requested."

Breach as in the first count.

The defendants pleaded the general issue and four special pleas—two of them (Meredith and Tyner) pleading, separately, an additional plea.

The 2d and 3d pleas allege that the plaintiff had brought a former action (21 Howard, 489) against all the defendants except Smith, and had therein become non-suit; the latter (3d) alleging that this occurred after the jury had retired from the bar, and, although by leave of the Court, contrary to the objection of the defendants. (Printed Record: pp. 5, 6, 7.)

The plaintiff demurred to these two pleas, and his demurrer was sustained. (Printed Record: pp. 9, 10.)

By the Revised Statutes of Indiana (1843) chapter 40, sec. 319, it is declared:

"The plaintiff may suffer a nonsuit at any time before the verdict of the jury shall have been received by the Court." (Page 732.)

And this accords with the common law. Phillipps on Evidence, Cowen & Hill's edition, vol. 3, page 836, note 589. Homer *v.* Brown, 16 Howard, 354.

The 5th plea (Printed Record: pp. 7, 8.) is in these words:

Actionem non, &c. "Because they [the defendants] say that after the execution of said written agreement, and before the expiration of two years from the first day of October, 1853, to-wit, on the 13th day of April, 1854, the stock of the said Cincinnati, Cambridge, and Chicago Short Line Railway Company was merged and consolidated with the stock of another railroad corporation of the State of Indiana, known and designated as the Cincinnati, Newcastle, and Michigan Railroad Company, both of which corporations were organized and formed under and in pursuance of the act of the General Assembly of the State of Indiana, entitled an act to provide for the incorporation of railroad companies, approved May 11th, 1852, the said two roads being connecting and intersecting roads, and which consolidation was made with the consent of the stockholders and directors of both of said companies, and by said consolidation the stock of both of said companies was merged and consolidated, making one joint-stock company of the said two companies; and the said consolidated company assumed the corporate name of the Cincinnati and Chicago Railroad Company.

"And afterwards, to-wit, on the —— day of August, 1854, the said Cincinnati and Chicago Railroad Company was merged and consolidated with another corporation of the State of Indiana, known and designated as the Cincinnati, Logansport, and Chicago Railroad Company, and which last named company was then constructing a road which intersected with the said Cincinnati and Chicago Railroad Company; and by the said consolidation, the stock of the said two companies was merged and consolidated, forming one joint-stock company out of said two companies; and said consolidation was made with the consent of the directors and stockholders of the said two companies, and with the consent of said plaintiff; and said consolidated company assumed the corporate name of the Cincinnati and Chicago Railroad Company.

"*And said defendants aver that*, by reason of the said consolidation above specified, *the said stock of the Cincinnati, Cambridge, and Chicago Short Line Railway Company, in said agreement specified, was destroyed, and rendered wholly worthless and of no value.*"

Concludes with a verification.

To which the plaintiff replied, January 22d, 1861:

"And the plaintiff, as to the plea of the defendants fifthly above pleaded, says that the stock of the said Cincinnati, Cambridge, and Chicago Short Line Railway Company issued to him, the said plaintiff, as by the defendants in their undertaking recited, was not destroyed and rendered wholly worthless and of no value by reason of the supposed consolidation of the said Company with the Cincinnati, Newcastle, and Michigan Railroad Company and with the Cincinnati, Logansport, and Chicago Railroad Company, as in the said plea mentioned, with the consent of him, the said plaintiff, in manner and form as by the said plea alleged. And this he prays may be enquired of by the country." (Printed Record: p. 11.)

The defendants demurred specially to this replication, December 4th, 1861, assigning for causes of demurrer:

1. "That said replication is neither a traverse nor confession of the consolidation of said Railroad Companies as alleged in said plea."
2. "Said replication does not deny the consolidation of said Railroad Companies, as in said plea alleged, nor that, by reason of such consolidation, the said stock was rendered of no value."
3. "Said replication is argumentative, and not positive, in its averments." (Printed Record: p. 11.)

Which demurrer the Court sustained; and the plaintiff

thereupon, by leave, filed an amended replication, December 11th, 1861:

"And the plaintiff, as to the plea of the defendants fifthly above pleaded, says that the said defendants, at the time when the several causes of action in the declaration mentioned accrued to him, the said plaintiff, to-wit, at the District of Indiana aforesaid, of their own wrong, and without the cause in their said plea alleged, neglected and refused to perform their several promises and undertakings in the introductory part of said plea admitted, and the non-performance whereof is by the said plea attempted to be justified, in manner and form as he, the said plaintiff, hath above complained against them. And this he prays may be enquired of by the country." (Printed Record: p. 12.)

To which, also, the defendants demurred specially (December 12th) assigning for causes of demurrer:

1. "Said replication is not a traverse, in direct terms, of either the actual consent of the plaintiff to the consolidations, or of the consolidations themselves, as alleged, which are the material matters alleged in the plea."
2. "Said replication is a traverse of an immaterial matter (the injury and destruction of the stock by the consolidations) and does not traverse the gist of the plea, the consolidations or the consent of the plaintiff."
3. "The replication is argumentative in this, that it merely traverses that the stock was injured or destroyed by the consolidation, which is merely a consequence flowing from the acts that of themselves, by consent of the plaintiff, put the stock into a different character than that guarantied."
4. "If, as the plaintiff claims, the replication puts in issue the consolidations and the plaintiff's consent thereto, it is double in that respect; as either is an issuable fact, and

should have been singly traversed." (Printed Record: pp. 12, 13.)

Which demurrer, also, the Court sustained; and the plaintiff thereupon (Printed Record: p. 13.) immediately filed a second amended replication:

"And the plaintiff, as to the plea of the defendants fifthly above pleaded, says that he ought not by reason of any thing therein alleged to be barred or precluded from having and maintaining his aforesaid action against the defendants, because he says that the said stock of the Cincinnati, Cambridge, and Chicago Short Line Railway Company was not destroyed, either in whole or in part, nor was the same rendered worthless and of no value, in manner and form as the defendants by their said plea have alleged; and this he prays may be enquired of by the country."

To which the defendants again demurred specially, and for causes of demurrer assigned:

1. "The plea sets up the traversable facts of the consolidation of the stock of the Cincinnati, Cambridge, and Chicago Short Line Railway Company with the stocks of other railway companies, which are the only traversable facts in the plea, which are neither admitted nor denied by the replication."
2. "The plea sets up the consolidations of the stocks therein described with the consent of the plaintiff, either of which, if correct as mentioned, is an issuable fact; and the replication is a denial of both, and is therefore double."
3. "The replication is informal, inasmuch as it does not deny some one of the issuable facts set up in the plea." (Printed Record: pp. 13, 14.)

Which demurrer the Court sustained—and thereupon (Printed Record: p. 14.) gave a final judgment for the defendants.

POINTS.

I. Where a plea contains several material allegations, which together constitute the supposed defence, it is competent for the plaintiff to put them all in issue by one replication.

Stephen on Pleading, 263, 264.
Robinson *v.* Rayley, 1 Burrow, 316.
O'Brien *v.* Saxon, 2 B. & C. 908.
Selby *v.* Bardons, 3 B. & Ad. 2.
Bardons *v.* Selby, in the Exchequer Chamber, 3 Tyrwhitt, 430.
Pigott *v.* Kemp, 3 Tyrwhitt, 128.
Isaac *v.* Farrar, 1 M. & Welsby, 69.
Strong *v.* Smith, 3 Caines, 160.

Such a replication cannot be double except when the plea itself is double; and a defendant is foreclosed of that objection (consequently) in all cases.

Reynolds *v.* Blackburn, 7 Ad. & Ellis, 161.
Barnes *v.* Hunt, 11 East, 455.

II. The general replication de injuria is not confined to actions of tort, but applies equally to actions sounding in contract.

Griffin *v.* Yates, 2 Bing. N. C. 579.
Bennett *v.* Bull, 1 Exch. Rep. 593.
Gibbons *v.* Mottram, 6 Man. & G. 692.
Scott *v.* Chappelow, 4 M. & G. 336.

Whitehead *v.* Walker, 9 M. & Welsby, 506.
Cowper *v.* Garbett, 13 M. &. W. 33.
Mitchell *v.* Cragg, 10 M. & W. 369.
Watson *v.* Wilks, 5 Ad. & Ellis, 237.
Strong *v.* Smith, 3 Caines, 160.

So decided, repeatedly, by the Supreme Court of Indiana:
Mitchell *v.* Sheldon, 2 Blackford, 185.
Farmer *v.* Fairman, 5 Blackford, 257.
McFall *v.* Wilson, 6 Blackford, 260.

III. The "guaranty" of the defendants, being upon a separate consideration to them, *directly*, is not an undertaking as sureties, but as principals.

Bushell *v.* Beavan, 1 Bing. N. Cases, 103.
Haigh *v.* Brooks, 10 Ad. & Ellis, 309.
Jepherson *v.* Hunt, 2 Allen, 417.
Townsley *v.* Sumrall, 2 Peters, 170.
Emerson *v.* Slater, 22 Howard, 28.
Hill *v.* Smith, 21 Howard, 283, 284.
Brown *v.* Curtiss, 2 Comstock, 225.

Especially, as the stipulations of the defendants are not the same as the stipulations of the Railroad Company in its agreement with the plaintiff, May 6th, 1853.

Quintard *v.* De Wolf, 34 Barbour, 97.
Butler *v.* Edgerton, 15 Indiana Rep. 15.

It is immaterial whether the agreement of the Railroad Company with the plaintiff could, or could not, have been enforced.

Haigh *v.* Brooks, 10 Ad. & Ellis, 309.

IV. A consideration may be (first) any benefit to the promissor, or to a third person at his request, or (second) any loss, detriment, obligation, or charge to the promissee.

LORD ELLENBOROUGH, C. J., in Bunn *v.* Guy, 4 East, 194.
MARSHALL, C. J., in Violett *v.* Patton, 5 Cranch, 150.
Shoenberger *v.* Zook, 34 Penn. State Rep. 24.
Stewart *v.* Trustees of Hamilton College, 2 Denio, 408, 409.
Townsley *v.* Sumrall, 2 Peters, 182.
Hitchcock *v.* Coker, 6 Ad. & Ellis, 438.

Any valuable consideration, ever so slight, is sufficient (in the absence of fraud) to support the most onerous undertaking.

STORY, J., in Lawrence *v.* McCalmont, 2 Howard, 452.
PUTNAM, J., in Hubbard *v* Coolidge, 1 Metcalf, 93.
Oakley *v.* Boorman, 21 Wendell, 588.
Thomas *v.* Thomas, 2 Ad. & Ellis, New Series, 851.

V. Where an act of the promissee, which forms the consideration, has been at *the request* of the promissor, it is immaterial whether the express promise be subsequent or contemporaneous. The law implies a promise from the request.

Union Bank *v.* Coster, 3 Comstock, 211.
Parker *v.* Crane, 6 Wendell, 647.
Pawle *v.* Gunn, 4 Bing. N. Cases, 445.
Hunt *v.* Bate, Dyer, 272, a.

VI. The agreement of the defendants with the plaintiff, July 12th, 1853, having been executed on his part, they cannot (after being thus secured in the enjoyment of the

consideration) object any want of power in the Railroad Company to make the former agreement therein recited.

Bissell *v.* Michigan Southern and Northern Indiana Railroad Companies, 22 New York Rep. 258, 259, 260. Ib. 273, 274.

Moss *v.* Rossie Lead Mining Co., 5 Hill, 137.

Steam Navigation Co. *v.* Weed, 17 Barbour, 378.

Palmer *v.* Lawrence, 3 Sandf. S. C. Rep. 161, 162.

Rutland and Burlington Railroad Co. *v.* Proctor, 29 Verm. Rep. 93. Ib. 95, 96.

Allegheny City *v.* McClurkan, 14 Penn. State Reports, 81, 82.

Eastern Counties Railway Co. *v.* Hawkes, 5 House of Lords Cases, 331. Ib. 350. Ib. 371.

VII. Neither a change of name nor an enlargement of corporate powers will discharge a subscriber from his contract of subscription: that results only from an abandonment of the original enterprize, and the substitution of a new and wholly different one.

Gray *v.* Monongahela Navigation Co., 2 Watts & Sergeant, 156.

Currie *v.* Mutual Assurance Co., 4 Hen. & Munford, 315.

White *v.* Syracuse and Utica Railroad Co., 14 Barbour, 560, 561.

Foster *v.* Essex Bank, 16 Mass. Rep. 245.

Lincoln and Kennebec Bank *v.* Richardson, 1 Greenleaf, 79.

Bonaparte *v.* Camden and Amboy Railroad Co., 1 Baldwin, 205, 206.

Sprague *v.* Illinois River Railroad Co., 19 Ill. Rep. 174.

Schenectady and Saratoga Plank Road Co. *v.* Thatcher, 1 Kernan, 102, 103.

Fry *v.* Lexington and Big Sandy Railroad Co., 2 Metcalfe, 314.

English cases:

Ware *v.* Grand Junction Water Works Co., 2 Russ. & Mylne, 470.

South Wales Railway Co. *v.* Redmond, 10 Com. Bench Rep. N. S. 675.

Simpson *v.* Westminster Palace Hotel Co., 8 House of Lords Cases, 712.

VIII. The defendants cannot be excused for non performance of their stipulations upon the ground that performance was rendered impossible by the act of third persons.

Hale *v.* Rawson, 4 Com. Bench Rep. N. S. 85.

Broom's Legal Maxims, 183, 184, 185.

IX. A corporation formed by the consolidation of others (previously existing) is the successor of each, and is bound by their contracts (respectively) in the same sense.

Philadelphia, Wilmington, and Baltimore Railroad Co. *v.* Howard, 13 Howard, 333.

Lancashire and Yorkshire Railway Co. *v* East Lancashire Railway Co., 5 House of Lords Cases, 792.

Preston *v.* Liverpool, Manchester, and Newcastle upon Tyne Junction Railway Co., 1 Simons, N. S., 586.

Attorney General *v.* Corporation of Leicester, 9 Beavan, 546.

Cushman *v.* Shepard, 4 Barbour, 113, 114.

X. Corporations consolidated in virtue of the act of the Legislature of Indiana approved February 23d, 1853, form a joint-stock company, but not a new corporation.

Revised Statutes of Indiana (1860) Vol. 1st, p. 526.
Ib. 504, 505, etc.
Warner *v.* Beers, 23 Wendell, 103.
Simpson *v.* Dennison, 16 Jurist, 828.
Farnum *v.* Blackstone Canal Co., 1 Sumner, 46.
Ohio and Mississippi Railroad Co. *v.* Wheeler, 1 Black, 297.
Booe *v.* Junction Railroad Co., 10 Indiana Rep. 93.

XI. The shares of stock belonging to the plaintiff, in the Cincinnati, Cambridge, and Chicago Short Line Railway Company, having been sold by the corporation after the taking effect of the Indiana act approved February 23d, 1853, authorizing the consolidation of railroad companies, were subject to whatever change of the corporate name or character might subsequently result from the operation of that statute.

Sparrow *v.* Evansville and Crawfordsville Railroad Co., 7 Indiana Rep. 369.
Booe *v.* Junction Railroad Co., 10 Ind. Rep. 93.
Sherman *v.* Smith, 1 Black, 587.
Midland Railway Co. *v.* Gordon, 16 M. & Welsby, 804.
South Bay Meadow Dam Co. *v.* Gray, 30 Maine Rep. 547. Ib. 552.
Burlington and Missouri River Railroad Co. *v.* White, 5 Iowa Rep. 409.

And the agreement of the defendants with the plaintiff, July 12th, 1853, whereby he was induced to accept those

shares of stock from the company, being equivalent to a subscription for the shares by him, at their request, the defendants cannot excuse the non-performance of their stipulations (contained in said agreement) on the ground of the subsequent consolidation of the company with others.

XII. The 5th plea is defective and bad (on general demurrer) because it does not allege that the consolidations therein specified were made without the consent of the defendants.

This even if they were sureties:

Bank of Steubenville *v.* Carrol, 5 Ohio Rep. 215.

Barker *v.* McClure, 2 Blackford, 14.

U. S. *v.* Tillotson, 1 Paine, 320, 321.

But the defendants have not stipulated as sureties: they are principal contractors, and, therefore, holden to a stricter line of defence.

Sprigg *v.* Bank of Mt. Pleasant, 10 Peters, 257.

Matter of Babcock, 3 Story, 398, 399.

The points upon the 4th plea, exclusively, are discussed after the argument of those above stated.

G. E. PUGH.

ARGUMENT.

It appears from the record that final judgment was given for the defendants, by the Circuit Court, upon a special demurrer to the second amended replication of the plaintiff to their fifth plea.

That plea alleges, in excuse for non-performance of their agreement, by the defendants, that the stock of the Cincinnati, Cambridge, and Chicago Short Line Railway Company had, with the plaintiff's consent, been merged and consolidated with the stock of two other companies; and that, by reason of such consolidation, the shares belonging to the plaintiff were not merely "destroyed" in name, but in fact —"*rendered wholly worthless, and of no value.*"

The plaintiff replied that his shares of stock were not "destroyed and rendered wholly worthless and of no value" by reason of such supposed consolidation, *modo et forma*, with his consent.

Afterward, by amendment, he traversed each and all the material allegations of the plea; and this in the old form de injuria sua propria absque tali causa, etc. To which, as well as to the first replication, a special demurrer was sustained.

Two very important questions arise upon these replications:

1. Whether the plaintiff could traverse more than one of the facts alleged in the plea?

2. Whether he could do this, in an action upon promises, by the old replication de injuria, or in some form equally comprehensive?

As to the First Question. It cannot be supposed that the author of the 5th plea intended to allege the three facts therein stated, namely, the consolidation, the plaintiff's consent, and the destruction of the stock, as three *separate* matters of defence. He meant to say that the defendants were excused from their agreement because the stock of the plaintiff had been destroyed, and that the destruction resulted from a consolidation to which the plaintiff had consented. He did not imagine, evidently, that a consolidation without the plaintiff's consent (whatever its consequences) would excuse the non-performance of the defendants; nor even that such non-performance would be excused by a consolidation with his consent, unless the value of the stock was thereby affected and impaired.

All three facts, alleged in the plea, constituted (together) a single point of defence; and that point, including all its elements, the plaintiff had clearly a right to put in issue.

"Thus," observes Mr. Serjeant Stephen, "in an action of trespass for breaking the plaintiff's close and depasturing it with cattle, the defendant pleaded a right of common in the close for the said cattle, being his own commonable cattle, levant and couchant upon the premises. The plaintiff, in the replication, traversed that the cattle were the defendant's own cattle, and that they were levant and couchant upon the premises, and commonable cattle. On demurrer for duplicity, it was objected that there were three distinct facts put in issue by this replication, any one of which would be sufficient by itself; but the Court held that the point of the defence was that the cattle in question were entitled to common; that this point was single, though it involved the three several facts that the cattle were the defendant's own, that they were levant

and couchant, and that they were commonable cattle; that the replication traversing these facts, in effect, therefore, only brought in issue the single point whether the cattle were entitled to common, and was, consequently, not open to the objection of duplicity." Steph. on Pl. 263, 264.

In the case of Robinson *v.* Rayley, 1 Burrow, 316, there cited, LORD MANSFIELD said:

"It is true you must take issue upon a single point, but it is not necessary that this single point should consist only of a single fact."

In O'Brien *v.* Saxon, 2 B. & C. 908, which was an action for maliciously suing out a commission of bankruptcy, the defendant pleaded that the plaintiff, being a trader, was indebted to him (the defendant) and had become a bankrupt; whereupon the plaintiff replied de injuria in the ordinary form. It was objected, on demurrer, that the plaintiff thus attempted to put in issue three facts—the trading, the indebtedness, and the act of bankruptcy—but the Court said that all these, *together*, constituted one proposition, to-wit, that the plaintiff had duly become a bankrupt; and, thereupon, the demurrer was overruled.

In Selby *v.* Bardons, 3 B. & Ad. 2, an action of replevin, the defendants avowed the taking, &c.—Bardons as collector of the poor-rates, and the other defendant as his bailiff. The avowry alleged that the plaintiff was an inhabitant of the parish, and ratable in respect of his occupancy of a certain tenement: it then alleged the making of a poor-rate, publication thereof, demand of payment and refusal, summons of the plaintiff before the petty sessions, judgment

against him, warrant of distress, &c. The plaintiff pleaded, in bar, de injuria, etc.—to which the defendants demurred, specially, for that said plea tendered issue of several distinct matters. Patteson and Parke, Justices, held the plea to be good; Lord Tenterden, C. J., dissented, and Taunton, J., having been consulted while at the bar, gave no opinion.

PARKE, J. "It is true that these pleas in bar put in issue a great number of distinct facts, and it is also true that the general rule is that where any pleading comprises several traversable facts or allegations, the whole ought not to be denied together, but one point alone disputed; and I am fully sensible that the tendency of such a rule is to simplify the trial of matters of fact, and to save much expense in litigation. But it is quite clear that from a very early period in the history of the law, an exception to this general rule has been allowed with respect to all actions of trespass on the case, in the plea of the general issue, and with respect to some actions of tort in the replication de injuria sua propria absque tali causa. This replication, where it is without doubt admissible, generally—indeed, it may be said, always—puts in issue more than one fact, and often a great number."

A writ of error was prosecuted, in the Exchequer Chamber, upon this judgment—and it was unanimously affirmed. Bardons *v.* Selby, 3 Tyrwhitt, 430.

In Isaac *v.* Farrar, 1 M. & Welsby, 69, LORD ABINGER, C. B., said:

"The rule of pleading is not that the issue must be joined on a single fact, but on a single point of defence."

That case aptly illustrates the distinction.

As to the Second Question. Since the new rules, in England, abridging the effect of a plea of the general issue in assumpsit, this subject has been frequently and thoroughly discussed.

In Griffin *v.* Yates, 2 Bing. N. C. 579, at Hilary term, 1835, an action upon a bill of exchange, Mr. Serjeant Stephen contended that the replication de injuria applied solely to actions sounding in tort. Tindal, C. J., after advisement, delivered the decision:

"We thought, at the time of the argument, that there might be some way of putting in issue, by the replication, all the facts alleged in the plea; and we now find that this has been decided by the Court of Exchequer. [Isaac *v.* Farrar, 1 M. & Welsby, 65.] But, as it has hitherto been doubted whether this could properly be done, under the new rules, by a replication de injuria, the plaintiff may have leave to amend."

Stephen. "The result is that de injuria may be replied in assumpsit."

Tindal, C. J. "It may, where the plea consists of matter of excuse."

Bosanquet, J. "That is, subject to the same rules as in Crogate's case, 8 Rep. 132."

In that case, the plaintiff had, by his replication, traversed, *seriatim*, every averment of the plea.

Bennett *v.* Bull, 1 Exch. Rep. 593, is a formal decision upon the same point.

In Cowper *v.* Garbett, 13 M. & W. 33, it was decided that de injuria could be replied in debt upon simple contract as well as in assumpsit.

In Mitchell *v.* Cragg, 10 M. & W. 369, assumpsit on a bill of exchange, in which there was a plea intended as accord and

satisfaction, the plaintiff replied "that the said plea and the statements therein contained, in manner and form as the same are therein pleaded, are not true in substance and in fact," concluding to the country. Held to be bad, on special demurrer, as amounting to an informal replication de injuria.

PARKE, B. "The objection to the form of replication which has been adopted here is that it appears to put in issue every fact alleged in the plea, whereas de injuria puts in issue only those facts which are material." Pp. 369, 370.

[De injuria does not traverse any recital of statutes; that part of the plea being superfluous. HOLT, C. J., in Chancey *v.* Win, 12 Mod. Rep. 583.]

In Watson *v.* Wilks, 5 Ad. & Ellis, 237, an action upon a promissory note, the defendant pleaded a failure of consideration; to which the plaintiff replied "that the defendant broke his promise without the cause in his plea, in that behalf, alleged," and the defendant thereupon demurred for duplicity.

PATTESON, J. "The recent cases in the Common Pleas and Exchequer were much discussed; and they go the length of deciding that where a plea to a declaration, on a bill of exchange or promissory note, rests on mere excuse, the replication de injuria is not only allowable, but the proper replication."

In Reynolds *v.* Blackburn, 7 Ad. & Ellis, 161, an action of assumpsit, where the plea was clearly double, but the plaintiff, instead of demurring specially, replied de injuria, it was argued by the counsel for the defendants that such a replication ought not to be admitted.

PATTESON, J. "You attempt to set up a plea which you allege

to be bad, because, as you contend, the plaintiff has made a bad replication. If your plea is double, and there is a general replication, you cannot take advantage of the fault of your plea to make the replication bad."

LORD DENMAN, C. J. "There is nothing in the point. The replication is, at least, as good as the plea."

And, evidently, a replication de injuria cannot be double, in any case, except where the plea itself is double.

See, in this connection, Barnes *v.* Hunt, 11 East, 455.

The same principle, as to both questions, was announced by the Supreme Court of New York, in Strong *v.* Smith, 3 Caines, 160. That was an action of assumpsit, and the replication traversed (comprehensively) all the material allegations of the plea.

THOMPSON, J. "It is undoubtedly a sound and established rule in pleading that a traverse is not multifarious, but to a single point. This, however, does not determine what shall be deemed a single point within that rule. *It cannot be a single fact.*" P. 162.

LIVINGSTON, J. "A traverse, it is not denied, must be of a material point; so, neither can a plea contain a multiplicity of distinct matters, for every issue (and that applies to a plea as well as to a traverse) must be single. By this, however, it is not intended that a plea shall consist of only *one* matter of fact; but it may contain as many as may be necessary to constitute one defence. A special plea can hardly be found that is not made up of a variety of facts; all, however, tending to, and making parts of, the same point of defence. * * * In such cases, the only rational rule must be that the plaintiff may traverse all, any, or either of the material facts which compose the point of his adversary's defence. This will not render the pleadings more complicated, or

intricate, than if he puts them immediately in issue by a total denial of them.

"*A contrary rule, by driving the party to an election of traversing only one of the circumstances, would produce unnecessary hardship.* Whatever is traversable, and not traversed, is admitted. *Why, then, by this mode of proceeding, compel either party to admit several important facts which the other may not be able to prove?*" Pp. 163, 164.

And why should a defendant, by pleading the general issue, non assumpsit, nil debet, or not guilty, be allowed to put the plaintiff upon proof of every material allegation of his declaration, and then refuse him the privilege, by a replication de injuria, of demanding that every material allegation of a plea shall be likewise proven?

At all events, in the State of Indiana, this could not be regarded as an open question. It had been decided by the Supreme Court, at November term, 1828, long before it had been decided in England. Mitchell *v.* Sheldon, 2 Blackford, 185.

A like decision was pronounced in Farmer *v.* Fairman, 5 Blackford, 257.

Again: McFall *v.* Wilson, 6 Blackford, 260—"To a plea "of failure of consideration, in a suit on a promissory note, "a general replication that the consideration had not failed "as alleged, is sufficient."

These three decisions are not only valuable in themselves, but furnish a rule of pleading from which the Circuit Court was not, in the circumstances, at liberty to depart.

With these observations, I dismiss the objection that either replication was double, or argumentative.

It was objected, also, that the first replication neither confessed nor traversed the fact of consolidation; but this, evidently, arises from a misapprehension of the rule of pleading. By not traversing that fact, as Mr. Justice Livingston properly said, in Strong *v.* Smith, 3 Caines, 164, the plaintiff clearly confessed it. And so the replication intended: it traversed the other two facts—the consent of the plaintiff, and the destruction of the stock.

—o—

The plaintiff, being refused the right of traversing more than one allegation of the plea, then filed his second amendment.

This, admitting the fact of consolidation, and that it was with his consent, denied that the stock mentioned in the plea, as belonging to him, had been destroyed, "either in whole or in part," by means of such consolidation, or that it had *thereby* been "rendered worthless and of no value" as alleged.

To this again the defendants demurred (specially) for the reason that the replication traversed only an immaterial allegation; which demurrer the Court sustained—and thereupon gave a final judgment.

I pause here to ask, if *this* objection be well founded, why the demurrer to the original replication was not overruled? That traversed two allegations—the destruction of the stock, and that the plaintiff had consented to the consolidation of the company with others. If the former be so immaterial that it cannot be traversed separately (as the Circuit Court

decided) how could the traverse of it and of another but material allegation, by one replication, present a case of duplicity? Steph. Pl. 259, 260, 261.

But I do not agree that it is immaterial: I insist, on the contrary, that it is the most important allegation of the plea —one without which no plausible ground of defence is even suggested.

Referring to the contract of the parties, as recited in the declaration, we learn that Clearwater had agreed with the Cincinnati, Cambridge, and Chicago Short Line Railway Company, on the 6th of May, 1853, to sell and convey to it certain lands, in the State of Indiana, for ten thousand dollars (nominally) in its capital stock; but upon express condition, in the contract of sale, that the Company should furnish him a guaranty that its stock would be at par within one year from the completion of the entire line of the road.

Suppose, for the sake of argument, that *this* stipulation is illegal (ultra vires) on the part of the corporation; so that the plaintiff could not have enforced it, nor recovered any damages for its breach. The transaction was incomplete on the 12th of July, 1853, when the defendants and the plaintiff came together—inasmuch as no guaranty had been furnished, and the plaintiff had neither conveyed the land nor accepted the stock. He was in a situation, therefore, to rescind the entire agreement; and he would have rescinded it, assuredly, on ascertaining that the Company had not the power of effectual performance. But Meredith, one of the defendants, as to whom no question of disability could arise, purchased from the Company, at that time, all its interest in

this unexecuted bargain and agreement; whereupon the defendants, with the consent of the Company, requested the plaintiff to convey the land to him. The plaintiff was not bound to make any such conveyance: he could not have been compelled to transfer the title to Meredith, immediately, even if the Company had performed its agreement with him—and far less when the agreement had not been performed, and was invalid.

This conveyance of the land to Meredith, on the 12th of July, 1853, is a sufficient consideration for the promise of the defendants. It was an act done by the plaintiff at their request—and, being such, is a consideration moving to them, and all of them, directly. Whether we regard the previous agreement of the Company with the plaintiff, in respect to the same land, as valid or invalid, the promise of the defendants to the plaintiff was upon a new and distinct consideration, and is subject to no cause of exception.

The defendants are not *guarantors* of the Company under its agreement—nor in any legal sense. Their promise not only stands upon a separate consideration; it is wholly different in terms. The Company stipulated with the plaintiff that ALL its capital stock should be at par, *every where*, within one year from the completion of the entire line of the road. The defendants restrained their stipulation (expressly) to the shares of stock accepted by the plaintiff; and is that *those* shares shall be at par in Cincinnati—not any where else. And it extends to one year after the completion of the road from Cincinnati to Newcastle; which is a portion merely, and not the entire line. The fourth and last particular was not embraced in the agreement of the Company with

the plaintiff: it is that the road from Cincinnati to Newcastle shall be completed within two years from the first of October thereafter.

The defendants have employed the word "GUARANTY" in their agreement; but they are, nevertheless, original promissors—not sureties. The case between them and the plaintiff is really this: He was under no obligation to convey the land to Meredith, on the 12th of July, 1853, and was in a situation to rescind his agreement with the Company on account of its corporate disability (if disability in fact existed) to perform in his favor. But he did make such a conveyance, *at the request of the defendants*, and with the Company's assent; thus forever abandoning his opportunity of rescission. And, in consideration of *that* conveyance, the defendants promised the plaintiff, DIRECTLY, that the 200 shares of stock which he received from the Company upon condition, but which he could and would have surrendered, or refused to accept, in the alternative of rescission, should be at par in Cincinnati, Ohio, within one year after the completion of the road from Cincinnati to Newcastle—and that such completion should not be delayed more than a specified time.

Obviously, it is of no consequence whether the agreement of the Company with the plaintiff was valid or invalid. If valid, the conveyance to Meredith directly, at the request of the defendants, is a sufficient consideration for their promise: if invalid, the abandonment of his opportunity of rescission, by the plaintiff, is an additional and equally sufficient consideration.

These propositions may as well be verified at once.

Shoenberger *v.* Zook, 34 Penn. State Rep. 24: "A release to a third party of an interest in lands, at the request of the promissor, is a good consideration for his promise, in a certain event, to pay to the releasor a sum of money in addition to the consideration mentioned in the release."

And that was a case of parol agreement.

Bushell *v.* Beavan, 1 Bing. N. Cases, 103. The plaintiffs being owners of a ship hired by H. C. Sempill, on charter-party, refused to let her sail until certain disputes between him and them, respecting the freight, had been settled; whereupon the defendant, in consideration that the plaintiffs would allow Sempill to take the ship, without giving security, promised to obtain the signature of a third person (Macqueen) to a written guaranty of payment of the freight. This promise was in writing, but did not express any consideration. It was therefore contended, on the part of the defendant, that no action could be maintained; the promise being to answer for the debt, default, or miscarriage of another.

TINDAL, C. J., delivered the opinion of the Court after advisement.

"It is next objected that the promise on which the action is brought is a promise to answer for the debt, default, or miscarriage of another person; and that no action is maintainable upon it, according to the well known rule of law, because the consideration of the promise does not appear in writing as well as the promise itself. The promise on which the first count is framed is an undertaking, by the defendant, to get a copy of a guaranty, which is written above it, duly signed by Mr. Potter Macqueen, and, within a week afterwards, delivered to the plaintiffs' agent. The immediate consideration for

that promise was the removal by the plaintiffs of a stop which they had put upon the vessel, then lying in St. Katharine's docks, and the permitting her to sail on the voyage before the security was signed. Under these circumstances, the contract appears to us not to be a contract to answer for the debt, default, or miscarriage of any other person, *but a new and immediate contract between the defendant and plaintiffs*. If Mr. Macqueen had signed the guaranty, that guaranty would, indeed, have been within the statute of frauds; for his is an express guaranty to be answerable for the freight due, under the charter party, if Sempill did not pay it. But no person could be answerable on the promise to procure his signature but the defendant. Sempill had never engaged to get the guaranty of Macqueen, nor had Macqueen engaged to give it. There was, therefore, no default of any one for which the defendant made himself liable; but he did so, simply, upon his own *immediate* contract."

Haigh *v.* Brooks, 10 Ad. & Ellis, 309. Action because, in consideration that the plaintiffs, at the request of the defendant, would give up to him a certain guaranty of £10,000, on behalf of Messrs. John Lees & Son, Manchester, then held by the plaintiffs, he (defendant) undertook and promised to see that certain bills accepted by Lees & Son were paid at maturity, to-wit, bills drawn by the plaintiffs on Lees & Son, and by them accepted, &c. Averment that said bills were not paid, at maturity, by Lees & Son.

Plea: that said supposed guaranty was a special promise to answer for the debt and default of others, to-wit, Messrs. Lees & Son, and no agreement in respect thereof, or any memorandum or note showing any sufficient consideration for the same, was in writing and signed by the defendant or any person authorized by him.

To which plea the plaintiffs demurred.

Lord Denman, C. J. "Here, whether or not the guaranty could have been available within the doctrine of Wain *v.* Warlters, 5 East, 10, the plaintiffs were induced by the defendant's promise to part with something which they might have kept, and the defendant obtained what he desired by means of that promise. Both being free, and able to judge for themselves, how can the defendant be justified in breaking this promise by discovering afterwards that the thing in consideration of which he gave it did not possess that value which he supposed to belong to it? It cannot be ascertained that that value was what he most regarded. He may have had other objects and motives, and of their weight he was the only judge. We therefore think the plea bad, and the demurrer must prevail."

Affirmed in the Exchequer Chamber, 10 Ad. & Ellis, 323.

Jepherson *v.* Hunt, 2 Allen, 417. Part of the plaintiff's land had been taken for the construction of a railroad, and he had applied to the County Commissioners for an assessment of his damages; whereupon, by agreement with the railroad company, an estimate of the damages was made, and it was stipulated that said sum might be entered of record as an assessment, by the Commissioners, without any view of the premises. Held:

1. That an oral promise by the defendant, upon a sufficient consideration, to pay the plaintiff interest on the amount of his damages, so assessed, until the railroad company should be able to pay the principal sum, is not within the statute of frauds—or, in other words, is an *original* agreement.

2. If it appear from the circumstances that the object

of the promissor was to secure the beneficial operation of the railroad, by running passenger and freight trains over the same, for the reasonable accommodation of himself and others for whom he acted, that is a *sufficient* consideration.

Bigelow, C. J. "The rule is well settled that when the leading object of a promissor is to induce a promissee to forego some lien, interest, or advantage, and thereby to confer on the promissor a privilege or benefit which he would not otherwise possess or enjoy, an agreement made under such circumstances, and upon such a consideration, is a new, original, and binding contract, although *the effect* of it may be to assume the debt and discharge the liability of another." P. 423.

Townsley *v.* Sumrall, 2 Peters, 170. Action by Sumrall, as plaintiff, on a verbal promise of Thomas F. Townsley, one of the firm of Townsley & Co., to accept a certain bill of exchange to be drawn upon said firm, at New Orleans, by Richard S. Waters in favor of the plaintiff; the bill not having been accepted, but returned under protest. Verdict and judgment for the plaintiff in the Circuit Court, and affirmed in this Court, at January term, 1829.

Mr. Justice Story delivered the opinion:

"If a person undertake, in consideration that another will purchase a bill already drawn, or thereafter to be drawn, and, as an inducement to the purchase, to accept it, and the bill is drawn and purchased, upon the credit of such promise, for a sufficient consideration, such promise to accept is binding upon the party. It is an original promise to the purchaser, not merely a promise for the debt of another; and having a sufficient consideration to support it in reason and justice, as well as in law, it ought

to bind him. It is of no consequence that the direct consideration moves to a third person—as, in this case, to the drawer of the bill—for it moves from the purchaser, and is his inducement for taking the bill. He pays his money upon the faith of it, and is entitled to claim a fulfilment of it. It is not a case falling within the objects or the mischiefs of the statute of frauds. If A. says to B., pay so much money to C., and I will repay it to you, it is an original independent promise; and if the money is paid upon the faith of it, it has been always deemed an obligatory contract, even though it be by parol, because there is an original consideration moving between the immediate parties to the contract. Damage to the promissee constitutes as good a consideration as benefit to the promissor. In cases not absolutely closed by authority, this Court has already expressed a strong inclination not to extend the operation of the statute of frauds so as to embrace original and distinct promises made by different persons, at the same time, upon the same general consideration. [D'Wolf *v.* Rabaud, 1 Peters, 476.] Then, again, as to the consideration, it can make no difference in law whether the debt for which the bill is taken is a pre-existing debt, or the money then paid for the bill. In each case, there is a substantial credit given by the party to the drawer upon the bill, and the party parts with his present rights at the instance of the promissor, whose promise is substantially a new and independent one, and not a mere guaranty of the existing promise of the drawer. Under such circumstances, there is no substantial distinction whether the bill be then in existence, or be drawn afterwards. In each case, the object of the promise is to induce the party to take the bill upon the credit of the promise; and if he does so take it, it binds the promissor. The question whether a parol promise to accept a non-existing bill amounts to an acceptance of the bill when drawn is quite a different question, and does not arise in this case." Pp. 181, 182, 183.

Emerson *v.* Slater, 22 Howard, 28. The plaintiff (Em-

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Emerson *v.* Slater, 22 Howard, 28. The plaintiff (Em-

erson) had contracted with the Boston and New York Central Railroad Company, of which the defendant (Slater) was President and a stockholder, for the construction of certain bridges. In July, 1854, the Company became insolvent; whereupon the plaintiff, to whom it was largely in debt, retained possession of the bridges, then incomplete, and refused either to surrender them or to proceed with the work. On the 14th of November, 1854, the defendant agreed with the plaintiff, in writing, that if the plaintiff would complete all the bridge-work to be done for the Railroad Company, "ready for laying down the iron rails for one track," by the first of December thereafter, he (the defendant) would make certain payments.

It appearing, on the trial, that the plaintiff had not completed the work in due time, under this agreement, he offered to prove that the time had been enlarged by a subsequent parol stipulation. To such testimony, however, the defendant objected; assuming that his written agreement of November 14th, 1854, was "a special promise for the debt, default, or misdoings of another, and that the alleged waiver, substitution, and extension, not being in writing, were within the statute of frauds." (22 Howard, 37.) The Circuit Court sustained this objection, and excluded the testimony; and, thereupon, the plaintiff's action failed. But that decision was reversed by this Court, on writ of error, at the December term, 1859. Mr. Justice CLIFFORD pronounced the opinion.

"Assuming the theory of the defendant to be correct—that, by the true construction of the contract, his undertaking was a special promise for the debt, default, or misdoings of the railroad company—then, perhaps, the better opin-

ion is, according to the weight of authority, that a written contract within the statute of frauds cannot be varied by any subsequent agreement of the parties, unless such new agreement is also in writing. Decided cases, however, are referred to, from the Massachusetts reports, which evidently wear a different aspect; and it is contended by the counsel for the plaintiff that the principle adopted in those cases constitutes the rule of decision in this case. But it is unnecessary to determine that point at the present time—as we are of opinion that the promise of the defendant, contained in the written agreement, was an *original* undertaking, on a good and valid consideration moving between the parties to the instrument.

"Cases in which the guaranty or promise is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the credit given to the principal debtor, are, in general, within the statute of frauds. Other cases arise, which also fall within the statute, where the collateral agreement is subsequent to the execution of the debt, and was not the inducement to it; on the ground that the subsisting liability was the foundation of the promise on the part of the defendant, without any other direct and separate consideration moving between the parties. But whenever the main purpose and object of the promissor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute—although it may be, in form, a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability.

"Nothing is better settled than the rule that if there is a benefit to the defendant and a loss to the plaintiff, consequential upon and directly resulting from the defendant's promise in behalf of the plaintiff, there is a sufficient consideration moving from the plaintiff to enable the latter to maintain an action upon the promise to recover compensation.

"Other authorities state the proposition much stronger; authorizing the conclusion that benefit to the party by whom the promise is made, or to a third person at his instance, or damage sustained, at the instance of the party promising, by the party in whose favor the promise is made, is sufficient to constitute a good and valid consideration on which to maintain an action.

"Apply these principles to the terms of the written agreement, in view of the attending circumstances and the subject matter, and it is quite clear that the promise of the defendant was an original undertaking on a good and valid consideration moving from the plaintiff at the time the instrument was executed. On its face, it purports to be a contract between the parties for their own benefit; one agreeing to do certain work and furnish certain materials, and the other agreeing to pay therefor a stipulated compensation. Their promises are mutual, and in one respect dependent. In consideration that the plaintiff engaged to do the work and furnish the materials by a given day, the defendant, on his part, agreed, among other things, when the work was completed, to give the plaintiff the five notes therein described. Reference was made to the contract of the plaintiff with the railroad company, in the first instance, as descriptive of the work to be done and of the materials to be furnished; and, in the second place, doubtless, for the reason that, as a part of the transaction, the company had placed or agreed to place securities in the hands of the defendant, to indemnify him for the liability he thereby assumed to the plaintiff." Pp. 42, 43, 44.

The Court seems to have adopted, in this instance, the general conclusions of Mr. Chief Justice Kent in Leonard *v.* Vredenburgh, 8 Johnson, 29. Later cases in New York are even more favourable.

Luqueer *v.* Prosser, 1 Hill, 256. Affirmed by the Court for the Correction of Errors, 4 Hill, 420.

Manrow *v.* Durham, 3 Hill, 584. Affirmed by the Court of Appeals, 2 Comstock, 533, 534.

Hill *v.* Smith, 21 Howard, 283, 284, was upon an agreement, dated August 17th, 1853, in this form:

"Whereas Henry Hill, of Delaware County, has proposed to convey to the Cincinnati, Newcastle, and Michigan Railroad Company a certain tract of land in Delaware County, containing three hundred and nine acres, for the consideration of six thousand one hundred dollars, to be paid in the capital stock of said company at par, on the condition that Caleb Smith and other responsible persons will guaranty that the said stock shall be worth par in three years from the present date, and, in default thereof, that the company shall make it up to par: And, whereas the said Cincinnati, Newcastle, and Michigan Railroad Company have agreed, by a resolution of their board of directors, to accept said proposition: Now, we, the undersigned, in consideration of the premises, hereby guaranty to the said Henry Hill that the said stock shall be worth par in three years from the date of this instrument. And if, at the expiration of that date, said stock shall not be worth par, we guaranty the said Henry Hill that the said Cincinnati, Newcastle, and Michigan Railroad Company shall make it up to him, or pay him whatever sum the said stock shall be worth less than par, so as to make the said stock worth par to said Henry Hill at that date."

Here, it will be observed, no separate consideration is stated for the undertaking of the promissors; and they do not stipulate for themselves in the first instance. If an action could be maintained on that agreement, as the case of an original promise, far more certainly ought an action to lie upon the agreement now in question.

The Circuit Court for Indiana decided in favor of the de-

fendants upon demurrer to a declaration reciting that agreement; whereupon Hill sued out a writ of error from this Court, and the judgment of the Circuit Court was reversed, at December term, 1858.

Mr. Justice GRIER delivered the opinion:

"As the contract is in writing, signed by the parties to be charged, it cannot be affected by the statute of frauds; and although the term 'guaranty' is usually applied to a collateral undertaking to pay the debt of another, yet, when taken in connection with the other terms of the instrument, this is clearly an original independent contract. If it had been under seal, the term 'covenant' would have been the technical synonym for the word 'guaranty' as here used.

"It states that the plaintiff would not agree to sell his land, in exchange for stock, except on condition that defendants should guaranty that the stock in three years would be worth par, or should be made so by the corporation. For this consideration defendants agree to make it so; or, in other words, to pay the difference between the cash value of the stock, on that day, and its nominal value.

"On this condition, and for this consideration, the plaintiff agreed to convey his land to the railroad company; and, on the faith of the defendant's undertaking, he has conveyed it, and accepted not money, but certain stock which defendants have agreed to make equal to money by a certain day. The declaration avers that, at the time specified, the stock was wholly worthless and of no value, and the railroad company utterly insolvent, and unable to pay the difference; and that defendants, having full notice of these facts, refuse to comply with their contract.

"There is no reason why this contract should be treated as void because of an illegal or immoral consideration. Its conditions require no previous suit to be instituted against any one as principal debtor. The declaration

contains every necessary averment: a valid contract, a large consideration paid, and a breach of the contract by defendants; all set forth in proper and technical language.

"The plaintiff is, therefore, entitled to judgment on the demurrer; unless the Court below, in their discretion, shall permit the defendants, on payment of costs, to withdraw their demurrer, and plead some good defence in bar." Pp. 286, 287.

Brown *v.* Curtiss, 2 Comstock, 225. Chester Brown, the plaintiff in error, transferred in payment of his indebtedness to the plaintiff below (Curtiss) a promissory note of G. F. Brown; upon the back of which he wrote and signed these words—"I guaranty the payment of the within."

Held:

1. That his liability was not the liability of an endorser, nor of an ordinary guarantor.

2. That his undertaking was not within the statute of frauds, and was valid, therefore, although it expressed no consideration.

Bronson, J. "Although, in form, this is a promise to answer for the debt or default of another, in substance it is an engagement to pay the guarantor's own debt in a particular way. He does not undertake as a mere surety for the maker, but on his own account, and for a consideration which has its root in a transaction entirely distinct from the liability of the maker. The defendant was a debtor to the plaintiff, and gave the note, with the guaranty, to satisfy that debt. * * * In such cases, where the party undertakes for his own benefit, and upon a full consideration received by himself, the promise is not within the statute. It would be good without any writing." P. 229.

So, in Butler *v.* Edgerton, 15 Ind. Rep. 15. That was upon an article dated Tenth month 31st, 1857, in these words:

"This is to certify that we, Nathan George and William Butler, of Wayne County, State of Indiana, having sold to Walter Edgerton, of Henry County, State aforesaid, on the 30th of Tenth month, 1854, two five hundred dollars real-estate mortgage-bonds on the Cincinnati and Chicago Railroad Company, drawing 10 per cent. interest per annum, payable half-yearly, and due the 1st of May, 1859, Butler and Meredith trustees; and, at the time, entered into an obligation to secure to the said Walter Edgerton the payment of the said interest as it should become due, and the bonds themselves when they should become due; and desiring to avail ourselves of the privilege of disposing of said bonds, for which we have been standing accountable, before the arrival of the said 1st of May, 1859, have taken the said bonds of the said Edgerton, and do hereby promise to pay the sum of one thousand dollars to the said Walter Edgerton, or order, on or before the first of Fifth month, 1859, and also to pay to him the same interest that would have accrued on said bonds, that is, 10 per cent. per annum, and to pay it up every half-year from the date of this obligation."

Defence: that the bonds were illegal, and, therefore, void —the Cincinnati and Chicago Railroad Company, a corporation of Indiana, having no power to stipulate for the payment of interest at 10 per cent.

Reply: that the bonds were executed in Ohio, where such interest was lawful, and were payable to a citizen of that State; the charter of the company authorizing it to borrow money, in other States than Indiana, at interest as therein respectively allowed.

Perkins, J. "The bonds, then, we must hold valid both as to

principal and interest; and when Butler and George sold and guarantied them, and received their pay, they made a legal contract. That contract has not been rescinded. Butler and George have not refunded to Edgerton the money he paid on it. A rescission was not desired; but Butler and George desired simply to substitute another obligation for its performance on their part, which Edgerton accepted. In this view, the whole agreement would seem to be valid.

"*But, in reality, it amounts but to an agreement to pay a sum of money; being the amount that would be due, including principal and interest, on certain bonds, and at the times when the same instalments became due.*" P. 20.

Add to these authorities the fact that the substituted agreement of the defendants with the plaintiff, on the 12th of July, 1853, differed in its *stipulations* from the agreement of the Cincinnati, Cambridge, and Chicago Short Line Railway Company with the plaintiff, on the 6th of May, 1853. Quintard *v.* DeWolf, 34 Barbour, 97.

It being manifest that the defendants were not sureties of the Cincinnati, Cambridge, and Chicago Short Line Railway Company, but original promissors, and stipulating for themselves, in the agreement of July 12th, 1853, we have next to consider what will, and what will not, excuse a man from the performance of his lawful undertaking.

And, first, his own heedlessness in contracting the obligation will not excuse him.

Hale *v.* Rawson, 4 Com. Bench Rep., New Series, 85: "Where there is an agreement to deliver goods on a condition which, without any default on the part of the vendor, never happens, he will not be liable for a non-delivery; but where the agreement is absolute, or conditioned on

> an event which happens, the vendor will be liable for a breach, though without default on his part: for it is his own heedlessness if he runs the risk of undertaking to perform an impossibility, when he might have provided against it by his contract."

The facts of that case amply illustrate the principle.

And so, as appears by the judgment of this Court in Hill *v.* Smith, 21 Howard, 283, the defendants are not to be excused by their folly (if such it was) in stipulating that a particular railroad should be completed from Cincinnati to Newcastle in a given time, or that certain shares of capital stock in the railroad company should be at par, in Cincinnati, within a specified time thereafter.

Second: It is obvious from the doctrine of Hale *v.* Rawson, cited above, that the defendants cannot excuse their non-performance on account of any act or default of a third person. Assume, for the present, that a consolidation of the Cincinnati, Cambridge, and Chicago Short Line Railway Company with another company would have the effect of destroying its capital stock: nevertheless, if that consolidation was the act of other persons than the plaintiff, and without his consent, the liability of the defendants upon their agreement, so far from being discharged, would become certain and absolute. Clearly, then, it was necessary for the defendants, in their 5th plea, to allege not only the fact of such consolidation, but (as an additional fact) that the plaintiff had consented thereto. Broom's Legal Maxims, 184, 185.

Is nothing else requisite? These parties did not bargain with each other upon a question of names, but of intrinsic value. Assuming the consolidated company to be a corporation (as to which I shall speak hereafter) it was certainly

the successor, in law, of the Cincinnati, Cambridge, and Chicago Short Line Railway Company, and was bound by the contracts of that company precisely as if no consolidation had occurred. Lancashire and Yorkshire Railway Co. *v.* East Lancashire Railway Co., 5 House of Lords Cases, 792.

So complete would be the identity, in such a case, that an action of COVENANT might be maintained against the new company, *by name*, upon a deed sealed with the corporate seal of any one of its constituent bodies. Philadelphia, Wilmington, and Baltimore Railroad Co. *v.* Howard, 13 Howard, 333.

The mere fact of consolidation, therefore, with or without the plaintiff's consent, is not material to the performance of this agreement on the part of the defendants. It may be that the Cincinnati, Cambridge, and Chicago Short Line Railway Company acquired, by means of such consolidation, a large additional property, or facilities of some other description for rapidly constructing its railroad and enhancing the value of its capital stock; and that the failure to complete the road from Cincinnati to Newcastle by the first day of October, 1855, or even before the commencement of this action, was due to the impossibility, or, at least, inherent difficulty of the enterprize. And so, upon the other hand, the consolidation may have involved its affairs in utter embarrassment.

This, however, is a question of fact—to be tried by a jury, and upon evidence. The plaintiff took issue in regard to it; but he was not allowed any trial of that issue.

And so it stands upon record, as the judgment of the Cir-

cuit Court in this case, that although the stock of the Cincinnati, Cambridge, and Chicago Short Line Railway Company was not destroyed, "EITHER IN WHOLE OR IN PART," by means of the consolidation of that company with other companies, as alleged in the 5th plea, the defendants are excused, nevertheless, from performing their stipulations above recited.

The case of The State, ex rel. Brown, Pros. Attorney, *v.* Bailey and others, 16 Indiana Rep. 46, does not authorize any such conclusion.

That was an information in the nature of quo warranto against certain persons claiming to be a corporation, and, as such, to construct and maintain a railroad. No question arose, nor, by the terms of the record, could have arisen, as to the consolidation of two or more corporations; although, as stated by Judge Perkins, a question of that sort may have been discussed at the bar. (P. 51) The learned Judge merely referred to the case of Lauman *v.* The Lebanon Valley Railroad Co., 30 Penn. State Rep. 42, and quoted, *arguendo*, the language of its syllabus.

But, in Lauman's case, the consolidation was by a special act of the Legislature providing for a new corporation, AS SUCH, to be formed by the entire merger of the corporate rights, powers, and privileges of two existing companies. And the decision was merely that a stockholder in one of the companies could not be *compelled* to accept stock in the new corporation thus formed.

That differs, widely, from the present case. The 5th plea does not allege that a new CORPORATION was created by the consolidation of the Cincinnati, Cambridge, and Chicago Short

Line Railway Company with either or both of the other companies named, but that "*one* JOINT-STOCK *company*" was formed by union of the three. And the statute of Indiana, authorizing consolidation, uses that peculiar language.

Act approved February 23d, 1853, Revised Statutes (1860) vol. 1st, p. 526:

> SEC. 1. "That any railroad company heretofore organized, under the general or special laws of this State, shall have the power to intersect, join, and unite their railroad with any other railroad constructed, or in progress of construction, in this State, or in any adjoining State, at such point on the State-line, or at any other point, as may be mutually agreed upon by said companies; and such railroad companies are authorized to merge and consolidate the stock of the respective companies, *making one* JOINT-STOCK COMPANY *of the two railroads thus connected*, upon such terms as may be by them mutually agreed upon, in accordance with the laws of the adjoining State with whose road or roads connections are thus formed: Provided, their charters authorize said railroads to go to the State-line, or to such point of intersection."

Upon the other hand, the general act of May 11th, 1852, "to provide for the incorporation of railroad companies," under which as well the Cincinnati, Cambridge, and Chicago Short Line Railway Company as both the other companies mentioned in the 5th plea were formed, expressly declares that the companies formed under it shall be "CORPORATIONS" in the proper sense. Revised Statutes of Indiana, Edit. of 1860, vol. 1st, pages 504, 505, etc.

Therefore, as shown by these two statutes, the Legislature of Indiana knew, *and intended to express*, the difference between a joint-stock company (as such) and a corporation.

It is not only a difference well established, but peculiarly significant in this connection. Warner *v.* Beers, 23 Wendell, 103. See, also, Simpson *v.* Denison, 16 Jurist, 828.

Again: the act of February 23d, 1853, provides (as we have seen) for the consolidation of Indiana railroad companies with similar companies created by the laws of Ohio, Illinois, and Michigan. But, assuredly, it will not be pretended that the State of Indiana could confer, or even assist in conferring, any *corporate* faculty to be exercised within the limits of another State.

Farnum *v.* Blackstone Canal Co., 1 Sumner, 46: "Where two corporations are created by adjacent States, with the same name, to construct a canal in each of the States, respectively, and afterwards their interests are united by subsequent acts of the States respectively, this does not merge the separate corporate existence of such corporations, but creates a unity of stock and interest only." (See, also, page 62.)

To the same effect is the case of the Ohio and Mississippi Railroad Co. *v.* Wheeler, 1 Black, 297.

All other decisions of the Supreme Court of Indiana are plainly in our favor.

Thus, in McCray *v.* Junction Railroad Co., 9 Ind. Rep. 358, a subscriber was released from his contract of subscription not so much on account of a consolidation of the company with another company as on account of a material change, thereby occasioned, in the termini of the railroad.

Such was the judgment, also, in Carlisle *v.* Terre Haute and Richmond Railroad Co., 6 Ind. Rep. 316, 317—although that was the case of a new corporation, as such, formed by

the consolidation of two companies in virtue of a special act of the Legislature, and not in virtue of the general act of February 23d, 1853, above recited.

The whole doctrine of the Courts of Indiana, upon this subject, is clearly stated by Judge Perkins in Booe *v.* Junction Railroad Co., 10 Ind. Rep. 93:

> "This suit involves the question decided in McCray *v.* The Junction Railroad Co., 9 Ind. Rep. 358. That question is whether two railroad companies, by consent of the Legislature, granted subsequently to the subscriptions of stock, but without the consent of the stockholders, can consolidate their separate existences into one. It is admitted that they can do it with such consent. This Court has held that they cannot without. A stockholder, not consenting, may withdraw from the corporation. *Such consolidation does not necessarily* DISSOLVE *the corporation*, it seems, *but releases non-consenting stockholders.*"

[It will be observed that the act of February 23d, 1853, does not specify *the manner* in which two companies may consent to their consolidation—whether by a vote of the directors only, or of the stockholders as well as of the directors.]

So far, then, from deciding that the consolidation of the Cincinnati, Cambridge, and Chicago Short Line Railway Company with another company, in virtue of the act approved February 23d, 1853, "dissolved" either corporation, or destroyed even *the character* of its capital stock, the Supreme Court of Indiana has plainly decided otherwise. The utmost effect is that, in some cases, a stockholder may, at his option, withdraw from the corporation of which he has been a member.

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Suppose that the plaintiff (Clearwater) had withdrawn from the Cincinnati, Cambridge, and Chicago Short Line Railway Company at the time of the first consolidation, April 13th, 1854, or subsequently, in August, 1854, at the time of the second consolidation: Would not the defendants have contended (and upon much more solid argument) that inasmuch as he had ceased to be the holder of the shares of stock in question before the time of performance had expired, October 1st, 1856, he had thereby and forever discharged their obligation? The plea does not allege that he *voted* for the consolidations, or either of them; and construing it strictly against the pleader (which is the rule at common law) we may well assume that his supposed consent wholly consisted in the fact that he did not withdraw from the company, and renounce the character of a stockholder.

But (as must have been observed) there is another and even more conclusive answer. The act of February 23d, 1853, was in force at the time when Clearwater made his agreement with the Cincinnati, Cambridge, and Chicago Short Line Railway Company, May 6.h, 1853, and, of course, at the time (July 12th) of his agreement with the defendants. He was not, therefore, a stockholder entitled to the privilege of withdrawing in the event of consolidation: he had subscribed in view of the possibility of such an event, and that possibility was one of the elements of his contract.

Midland Railway Co. *v.* Gordon, 16 M. & Welsby, 804. The defendant subscribed for stock in a company to construct a railway from Dublin to Mullingar, and thence to Athlone, the agreement for which authorized the directors to apply to Parliament for an act, and to do all that was necessary

toward forming the company; the subscribers stipulating to submit to all such "regulations" as Parliament should impose. The directors applied for an act, but Parliament only authorized the company to construct a railway from Dublin to Mullingar, and to purchase a canal (previously constructed) connecting the Liffey and the Shannon by way of Athlone. It was contended, on the part of the defendant, that his contract of subscription was no longer obligatory.

PARKE, B. "The only question here is whether the defendant subscribed to the undertaking sued on. Now he clearly is such a subscriber. That is all on which we need decide. Besides, under the general discretion to apply to Parliament, given by the subscribers to the original undertaking to their directors, the subscribers must take what Parliament will give; and are bound by it, accordingly, if the act pass. Even if, on application of the directors, Parliament by its act sanctions *another* undertaking, I should have a strong opinion that the original subscribers would be bound by it. Can it be said that the power to buy the canal may not be valuable for the purpose of bringing traffic to the railway?"

ROLFE, B. "The railway originally intended is identified as far as Mullingar. Probably there was no capital to carry it further."

POLLOCK, C. B., and PLATT, B., concurred—and judgment accordingly.

South Bay Meadow Dam Co. *v.* Gray, 30 Maine Rep. 547. The defendant subscribed for stock in a corporation subject, by the terms of its charter, to the duties and liabilities imposed by a general law; that law being subject, by its terms, to amendment, alteration, or repeal, by the Legislature, at any time. Held: that it constituted no defence to an ac-

tion for instalments that the Legislature had so altered the general law, *after the date of his subscription*, as considerably to increase the liabilities of the stockholders.

SHEPLEY, C. J. "The defendant cannot, therefore, correctly allege that his liability has been increased without his consent. He consented to such action of the Legislature by becoming a member of the corporation." P. 552.

To the same effect, precisely, is the case of the Burlington and Missouri River Railroad Co. *v.* White, 5 Iowa Rep. 409.

JUDGE PERKINS, in Booe *v.* Junction Railroad Co., 10 Indiana Rep. 93, stated the question to be: "Whether two railroad companies, by consent of the Legislature, *granted* SUBSEQUENTLY *to the subscriptions of stock*, but without the consent of the stockholders, can consolidate their separate existences into one?"

He made that observation in view of the case of Sparrow *v.* Evansville and Crawfordsville Railroad Co., 7 Ind. Rep. 369, which decides (expressly) that one who subscribes for stock *after* the enactment of a law authorizing the company to consolidate with another company is bound by his subscription, although such consolidation be without his consent or even knowledge.

In McCray's case, 9 Ind. Rep. 358, the subscription had been made *before* the act authorizing consolidation.

The principles declared by this Court in the case of Sherman *v.* Smith, 1 Black, 587, appear to me conclusive in this regard; and especially when we recollect that the Cincinnati, Cambridge, and Chicago Short Line Railway Company

was formed under the general act of May 11th, 1852, relating to railroads—an act subject to modification by the Legislature at any time.

Section 13th confers on each company the power of uniting its road with other roads. (Revised Statutes of Indiana, Edit. of 1860, vol. 1st, pp. 508, 509.)

Section 21st confers authority to change the route of the road. (Page 514.)

See, also, the following statutes:

Act approved June 15th, 1852, sec. 2d—Rev. Stat., 1860, vol. 1st, pp. 518, 519.

Act approved January 25th, 1853, Rev. Stat., 1860, vol. 1st, pp. 525, 526, etc.

Act approved February 22d, 1853, Rev. Stat., 1860, vol. 1st, pp. 524, 525, etc.

I do not consider it necessary to examine the cases in reference to an alteration of the route or termini of a railroad. No such alteration is alleged by the defendants in the 5th or any other plea. No alteration appears, of any kind, on account of which a subscriber could be discharged from his contract of subscription.

It is evident from the language of the defendants, in their agreement, that the projected road of the Cincinnati, Cambridge, and Chicago Short Line Railway Company commenced at or near Cincinnati, and thence extended to Newcastle: so far, at least, the corporate enterprize of the company and that of the Cincinnati, Newcastle, and Michigan Railroad Company (with which it was first consolidated) precisely agree. The 5th plea alleges that the two roads connected

with and intersected each other; but, inasmuch as it does not allege any alteration of intended route by the Cincinnati, Cambridge, and Chicago Short Line Railway Company, we must presume that the alteration (if any) was in the route of the other road.

The defendants only undertook for the completion of the railroad from Cincinnati to Newcastle; and it cannot be a matter of reasonable objection, upon their part, that the funds of another company were employed to facilitate such completion.

As to the second consolidation (with the Cincinnati, Logansport, and Chicago Railroad Company) that cannot have induced any change of the route between Cincinnati and Newcastle; and so far as we can judge by their titles—having, at present, no other means of judgment—the termini of the two intended roads were the same.

It cannot be *presumed* that the liabilities of the Cincinnati, Cambridge, and Chicago Short Line Railway Company were increased by means of either of these consonsolidations. The fact may be so; but, if so, it should have been alleged as matter of defence—or, at least, proven upon the issue tendered by the replication.

Nor do I consider it necessary to argue, in this connection, whether the agreement of the plaintiff with the Railway Company, dated May 6th, 1853, was originally valid or invalid. His agreement with the defendants, July 12th, 1853, has been executed upon his part; and they cannot, after receiving and enjoying the consideration of their promise, now

shield themselves by an excuse of disability, corporate or natural, in others.

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I have stated one objection to the 5th plea as pleaded, and upon the supposition that all its allegations are material. But the plea is defective in another and very important particular. It does not allege that the consolidation of the Cincinnati, Cambridge, and Chicago Short Line Railway Company with the Cincinnati, Newcastle, and Michigan Railroad Company, or with the Cincinnati, Logansport, and Chicago Railroad Company, was an act done without the consent, or even contrary to the wishes, of the defendants.

The 6th plea, by Meredith and Tyner only, contains such an allegation. (Printed Record: pp. 8, 9.) But that does not allege any consent of the plaintiff: for which reason, I suppose, it was overruled on general demurrer, at November term, 1860. (Printed Record: pp. 9, 10.)

Assuming the defendants to be sureties, and sureties entitled to the utmost favor, it is necessary, in order to exonerate them, that the principal contractor should have been discharged without their consent. Volenti non fit injuria.

Bank of Steubenville *v.* Leavitt and another, administrators of the estate of Robert Carrol, deceased, 5 Ohio Rep. 207. Action of debt upon a writing obligatory made by the intestate, August 7th, 1819. Plea: that Carrol signed the writing as surety for John C. Bayless, and not as principal debtor, of which the plaintiff had notice; that judgment was afterward taken against Bayless, by confession, for the

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The 6th plea, by Meredith and Tyner only, contains such an allegation. (Printed Record: pp. 8, 9.) But that does not allege any consent of the plaintiff: for which reason, I suppose, it was overruled on general demurrer, at November term, 1860. (Printed Record: pp. 9, 10.)

Assuming the defendants to be sureties, and sureties entitled to the utmost favor, it is necessary, in order to exonerate them, that the principal contractor should have been discharged without their consent. Volenti non fit injuria.

Bank of Steubenville *v.* Leavitt and another, administrators of the estate of Robert Carrol, deceased, 5 Ohio Rep. 207. Action of debt upon a writing obligatory made by the intestate, August 7th, 1819. Plea: that Carrol signed the writing as surety for John C. Bayless, and not as principal debtor, of which the plaintiff had notice; that judgment was afterward taken against Bayless, by confession, for the

same debt, and upon the same obligation, the plaintiff agreeing to stay execution for a specified time; and that execution had been stayed accordingly. General demurrer and joinder.

PER CURIAM. "It is objected to the plea that it does not sufficiently aver that the stay of execution was entered without the consent of the surety. *The want of this consent is the material fact of the whole defence.* We, therefore, think that the plea is defective." (P. 215.)

See, also, Barker *v.* McClure, 2 Blackford, 14, and United States *v.* Tillotson, 1 Paine, 320, 321.

But the defendants did not stipulate for any act of another person: they stipulated as principals, avowedly, and cannot now claim to be sureties. Sprigg *v.* Bank of Mt. Pleasant, 10 Peters, 257. Matter of Babcock, 3 Story, 398, 399.

This, therefore, is the material point of the defence: That for which the defendants stipulated, on the 12th of July, 1853, would have occurred but for the consolidation of the Railroad Company with other companies. And how could any consolidation have such an effect? First, if at all, because completion of the road from Cincinnati to Newcastle was *thereby* delayed, and, second, the capital stock of the Company was *thereby* diminished, and its value destroyed.

The defendants do not allege that the plaintiff discharged them intentionally, or even directly, from their agreement; but only that *in consequence* of an act to which he assented —not foreseeing or imagining the result—performance of their stipulation was prevented. (Broom's Legal Maxims, 184, 185.) Now, if *they* assented to the same act, and, a

fortiori, if they induced him to assent, with what justice, or by what principle of law, could they so excuse themselves? It seems to me that the very statement of such an objection is conclusive.

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FOURTH PLEA.

That is not before the Court immediately; but an opinion as to the points arising upon general demurrer (Printed Record: p. 9) will save both parties considerable expense and trouble. The language of Mr. Justice McLean, 21 Howard, 493, invites to this course; and it is warranted by the doctrine of Scott *v.* Sandford, 19 Howard, 393. Ib. 565, 566, 567.

The plea is in these words:

Actionem non &c. "Because they [the defendants] say that the said Cincinnati, Cambridge, and Chicago Short Line Railway Company, in plaintiff's declaration specified, and which issued the stock in said agreement specified, was a corporation of the State of Indiana, organized under and by virtue of a general law of said State, entitled an act to provide for the incorporation of railroad companies, approved May 11th, 1852, and said company had no other charter, and possessed no other powers than those which were conferred upon it by said law. Said defendants further aver that before the execution of said agreement, to-wit, on the 6th day of May, 1853, the said plaintiff agreed with the Cincinnati, Cambridge, and Chicago Short Line Railway Company to sell to said company the said tract of land in said agreement specified, for and in consideration of the sum of ten thousand dollars of the capital stock of said company, which it was agreed should be issued by said company to said plaintiff for

said land; but said sale was made only upon the condition that said company should furnish to said plaintiff a guaranty that said stock should be at par within one year from the completion of said road. Said defendants further aver that said agreement to furnish a guaranty that said stock should be worth par was made by the officers of said company with said plaiutiff secretly, without the knowledge or consent of the stockholders of said company, and without the same being in any manner made known publicly; and the said agreement in plaintiff's declaration specified was executed by said defendants in pursuance of said agreement above specified, upon the request of the said plaintiff and the said company, and for no other consideration whatever. Defendants further aver that after said plaintiff so sold said land to said company, and after defendants executed said agreement, a large amount, to-wit, one hundred thousand dollars in value, of real estate, was sold and conveyed to said company, by divers persons, for the capital stock of said company; and the said persons who so sold and conveyed said real estate to said company for stock knew, at the time they so sold the same to said company, that said plaintiff had sold said tract of land in said agreement specified to said company for ten thousand dollars of the capital stock of said company; but they were wholly ignorant of the fact that said secret guaranty of the value of said stock had been executed and delivered to said plaintiff: But said persons, knowing said plaintiff to be a shrewd business-man, and a man of sound judgment, and believing that he had sold said land to said company for their stock without any other inducement thereto than his judgment of the future value of said stock, were induced, by their confidence in the judgment of said plaintiff, to sell the said lands to said company for stock." Verification. (Printed Record: p. 7.)

The agreement of the defendants with the plaintiff, dated July 12th, 1853, expresses the consideration upon which it

was founded; whereas the defendants, by this plea, without objecting to the sufficiency of *that* consideration, allege a number of conclusions, facts, and circumstances tending to prove (if any thing) that *no* consideration ever existed as between the plaintiff and themselves.

The plea is bad, therefore, as amounting to the general issue; or else bad, as matter of confession and avoidance, because it gives no color to the plaintiff's action.

1 Chitty on Pleading, 525, 526, 527, etc.
Brown *v.* Artcher, 1 Hill, 266.
Conger *v.* Johnston, 2 Denio, 96.
Commercial Bank *v.* Sparrow, 2 Denio, 105, 106.
Mower *v.* Burdick, 4 McLean, 7.
See, also, Stanton *v.* Seymour, 5 McLean, 268.

That portion of the plea which denies the power of the Cincinnati, Cambridge, and Chicago Short Line Railway Company (as a corporation) to do certain acts therein mentioned, is wholly superfluous. The demurrer does not admit the truth of such allegations. It only admits what is well pleaded; and all *conclusions* of the pleader respecting matters of law, or even matters of fact, must be disregarded.

Commercial Bank *v.* Buckner, 20 Howard, 125.
See, also, McDonald *v.* Hobson, 7 Howard, 758.

Whether the agreement relating to the purchase of stock, as between the Railroad Company and the plaintiff, was secret or otherwise—known to all the stockholders and to the public at large, or only to a few persons—cannot be of the slightest importance.

If the Company made such an agreement with the plaintiff as the plea alleges, and had no corporate authority to make it, all the publicity in the world could not heal that defect; whereas, if the Company had authority to make such an agreement, secrecy would neither avoid nor impair it.

The allegation of secrecy does not tend to prove that any *fraud* was committed, or even attempted, in regard to the other stockholders: because nothing was taken, or to be taken, in any event, from the corporate funds or property—and, therefore, no stockholder could have been defrauded or injured.

As to the suggestion (I call it nothing more) that other persons, not named, were induced to become subscribers to the capital stock of the Cincinnati, Cambridge, and Chicago Short Line Railway Company, or conveyed their lands to it, "knowing said plaintiff to be a shrewd business-man, and a man of sound judgment, and believing that he had sold said land to said company for their stock without any other inducement thereto than his judgment of the value of said stock," there are six (and probably more) sufficient answers:

1. It is not alleged that the plaintiff requested them to become subscribers, or to convey their lands.

2. Nor that the plaintiff made any representation or assurance to them, or to any one of them.

3. Nor that they even enquired of him as to the terms of his particular agreement.

4. Nor that he knew they were about to rely, or would rely, on his judgment, or follow his example.

5. Nor that they, or any of them, lost any thing whatsoever by reason of such subscription or conveyance.

6. Nor, lastly, that the defendants were of the number of those persons, or at all interested in their welfare.

One subscriber to the stock of a corporation has no right to refer to, or act upon, the subscription of another.

Connecticut and Passumpsic Rivers Railroad Co. *v.* Bailey, 24 Verm. Rep. 477, 478.

See, also, Blodgett *v.* Morrill, 20 Verm. R. 514, 515.

Stripped of the allegations I have specified—allegations of no *legal* significance—the plea avers, substantially, that the plaintiff would not accept $10,000 of stock in the Cincinnati, Cambridge, and Chicago Short Line Railway Company, as the price of his land, without a guaranty that the stock would be valuable (at par) in a reasonable time; and, thereupon, the defendants assumed to guaranty such value, and the plaintiff, trusting in their good faith and responsibility, conveyed the title of his land.

Does this (admitting it to be strictly true) constitute any defence? If so, the case of Hill *v.* Smith, 21 Howard, 283, 284, was improperly decided.

The alleged fraud, whatever it be, as to the corporation, or other stockholders, is an affair between those parties and the plaintiff solely: the defendants have no concern with it.

But, in truth, as the record proves, no fraud was ever committed. The land was conveyed to Meredith as a *purchaser* from the Railroad Company; and the consideration paid by him, upon that purchase, was the price of the shares of stock allotted to the plaintiff, and thus enured to the advantage of the Company and all the stockholders.

The Company had a general power to acquire lands, and pay for them by the delivery of its own stock. Act of January 20th, 1853, Revised Statutes of Indiana (1860) vol. 1st, p. 124.

Observe, also, that the plaintiff did not subscribe for these shares in order to assist in organizing the Company as a body corporate: He purchased them, by agreement with the directors, after the corporation had been formed, and was legally in existence. The directors had authority to dispose of such unallotted shares in like manner, and to the same extent, as they could dispose of other corporate property. General Railroad Act of May 11th, 1852, sec. 9—Revised Statutes of Indiana (1860) vol. 1st, p. 508.

Reese *v.* Bank of Montgomery County, 31 Penn. State Rep. 78.

Wellersburg and West Newton Plank Road Co. *v.* Hoffman, 9 Maryland Rep. 559, 560. Ib. 568, 569.

Spartanburg and Union Railroad Co. *v.* DeGraffenreid, 12 Richardson, 575.

West Cornwall Railway Co. *v.* Mowatt, 15 Ad. & Ellis, New Series, 521.

Whatever the effect of the agreement dated May 6th, 1853, between the Railroad Company and the plaintiff, upon the ground that the Company had no power to make it, the subsequent agreement of the defendants with the plaintiff, July 12th, 1853, is entirely valid.

It would have been valid if it had been contemporaneous with the agreement of the Company, and upon the same consideration.

U. S. *v.* Bradley, 10 Peters, 360, 361, 362, 363.

One consideration may support two or more separate promises.

D'Wolf *v.* Rabaud, 1 Peters, 499, 500.

Townsley *v.* Sumrall, 2 Peters, 181, 182.

Hill *v.* Smith, 21 Howard, 286, 287.

But, as their own agreement recites, there was a new and perfectly distinct consideration for the promise of the defendants.

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Upon the whole record, therefore, I ask that the judgment of the Circuit Court may be reversed with costs; and that the cause may be remanded with instruction to sustain the demurrer of the plaintiff to the fourth and fifth pleas.

G. E. PUGH.